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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

BRIEF ON THE MERITS FOR APPELLEES NAMED WITHIN.

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O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL., APPELLEES.

BRIEF ON THE MERITS FOR

Enochs Lumber & Manufacturing Company, Ingalls Iron Works, O. L. Bunn, Doing Business as Bunn Electric Co.; Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Co., Natchez Drug Co., National Show Case Co., Schwartz & Stewart, Walter C. Schultz, Doing Business as Schultz Cabinet Works; Southern Cement Co., Truscon Steel Co., White Stone Co., Woodward, Wight & Co., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr. and R. Hicks Parker, Copartners, Doing Business as Natchez Brick Co.; C. R. Burkett, Doing Business as Burkett Sheet Metal Works; W. A. Jacobie, Geisenberger Bros. Drug Co., M. P. Phelan, Mosler Safe & Lock Co., Natchez Investment Co., and Engle & Laub, Appellees.

Express Reservation.

These appellees, having filed Motions to Dismiss and/or affirm, reserve, expressly, in this Brief upon the merits, all of the rights therein claimed, and first hereby insist upon said motion.

Statement of the Case.

This case involves the liability, in equity, of the surety, appellant, on a building contractor's bond for materials furnished to the contractor for the building of the Eola Hotel, at Natchez, Mississippi, by the Natchez Investment Company, the owner, appellee.

The questions arising are:

(1) The construction of the bond and the measure of liability of the surety thereon for materials furnished the contractor, principal in the bond, as a common law obligation.

This proposition has been fully briefed in our Motions to Dismiss or affirm, which is hereby adopted to save iteration.

(2) Whether appellant, a paid surety, doing an insurance business, and receiving compensation for such suretyship admeasured by the risk assumed, can question the constitutionality of the statutes of Mississippi, Section 3074, Code 1906, as amended by Chapter 128, Laws of 1918 (now Sections 2274-2281, Code 1930), even if the bond was executed under said statutes.

(3) Said Chapter 128, Laws of Mississippi, 1918 (Sections 2274-2281, Code of 1930), does not violate the Federal Constitution.

(4) The application of Ætna Casualty & Surety Company, surety of appellant on appeal bond to the Supreme Court of Mississippi, to become an appellant herein cannot be allowed.

The Pleadings and Evidence.

The Natchez Investment Company, the owner of the hotel constructed, obligee of the bond of the contractors, Burkes, filed its original bill in equity against (*a*) Burkes, the contractor; (*b*) appellant, the surety on the contractor's bond; (*c*) the materialmen and laborers who furnished the labor and materials to the contractor for the construction of the hotel; (*d*) and New Orleans Canal Bank & Trust Company, assignee of certain proceeds arising from the contract of construction, defendants to the bill.

The bill averred that the owner "is entitled to have it ascertained and determined whether said Bond" (of appellant) "in connection with said contract and specification is a bond *for the faithful performance of said contract* or *simply a bond of indemnity*" (Tr., 8). Reference is made specifically in the bond to concursus proceedings and the plans are made part thereof.

The prayer was to adjudicate whether this bond was for the faithful performance and thereby superior to all liabilities provided by Section 2, Chapter 128, Laws 1918, or subject thereto (Tr., 9).

The agreement, Exhibit "A" (Tr., 10), is "the standard form of agreement between contractors and owner for construction of buildings, issued by American Institute of Architects for use when a stipulated sum forms the basis of payment." *Johnson Electric*

Co. v. *Columbia Casualty Co.*, 133 So. (Fla.) 851, shows it slightly modified, but the Supreme Court of Mississippi held its obligation the same.

> "Article 6: *The Contract Documents*—The general conditions of the contract, the specifications, the drawings, together with this agreement, form the contract, and they are as fully a part of the contract as if hereto or herein repeated" (R. 12).

By the terms of the contract documents the Contractor obligated itself to give a bond to secure the Owner the faithful performance of the contract in strict accordance with the plans and specifications.

Amongst the obligations thereby intended to be secured were the obligations of the contractor to pay laborers, materialmen and sub-contractors for all work, labor and material that should go into the building.

It was further provided in the contract documents that the contractor's bondsmen should obligate themselves to all the terms and covenants of the specifications and of the contracts and contract documents, and amongst these obligations of the contract so to be guaranteed was the contractor's obligation to pay for all labor and material that should go into the building.

Furthermore, by the contract documents it was provided that the sureties of the various contractors (which necessarily included the principal contractors, J. V. & R. T. Burkes) should be, and they thereby declared and acknowledged themselves to be, bound to the Owner as guarantors separately and *in solido* with the contractors for the fulfillment of the terms of the contract documents.

This, necessarily, made the sureties assume all the obligations of the contractor under the contract documents and made such sureties liable for said obligations separately and *in solido* and, therefore, to all intents and purposes, as principals.

Amongst the obligations thereby intended to be covered was the obligation of the contractor to pay for labor and material (R. 3, 4). When this Appellant, Hartford Accident & Indemnity Company, executed its bond at the solicitation of J. V. & R. T. Burkes, and in pursuance of the contract made between Burkes and the Owner, the Hartford Accident & Indemnity Company on the face of its bond referred to the plans and specifications and contract documents, and by specific reference made the same in all their parts and clauses a part and parcel of the bond itself (R. 18).

We submit in the first instance that these obligations so specifically undertaken by Hartford Accident & Indemnity Company were undertaken by it solely and in consideration of the premium paid to it by the contractors.

Under local practice, upon demurrer, exhibits control the averments of the pleading. *McNeill* v. *Lee*, 79 Miss., 455.

The specifications appear, Exhibit "B" (Tr., 14); the bond, Exhibit "C" (Tr., 17).

The appellant demurred (Tr., 39), assigning, roughly, first, the bond was not a performance bond under Chapter 128, Laws 1918, but if the Court should hold otherwise, then, in virtue thereof, the constitutional rights of appellant were violated.

The petitions of appellees, materialmen, in said suit do not appear in the record.

The demurrer was overruled (Tr., 41), with an appeal allowed to the Supreme Court to settle principles of the case (Tr., 41); with the judgment thereon (Tr., 57). Then, as to these materialmen appellees, nothing further appears as having been done in the Chancery Court, save the rendition, on January 10, 1930, of final decree (Tr., 57), upon a full hearing on the merits.

Upon appeal therefrom to the Mississippi Supreme Court, the opinion was filed February 23, 1931 (Tr., 67) and judgment entered (Tr., 80, 81); a suggestion of error (under local practice, a petition for rehearing), was filed by appellant, and the opinion of the Supreme Court thereon appears (Tr., 86), with the appeal to this Court by the appellant alone. The Ætna Casualty & Surety Company, surety on the appeal bond, did not join therein. On December 8, 1931, after motion filed in this Court by materialmen to dismiss, Ætna Casualty & Surety Company seeks, without application to the Supreme Court of Mississippi, an appeal, and to join herein, the time for appeal having long since expired. Thereto these appellees object.

POINT I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State Court is not, on this record, entitled to raise a Federal question with this premium in its pocket.

Point II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that, Appellees, materialmen, having placed their personalty—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274-2281, Code 1930), does not violate the Federal Constitution.

Point IV.

Should the Court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common law obligation for judgment rendered.

Point V.

The application of Ætna Casualty & Surety Company, Surety of appellant on appeal bond to the Supreme Court of Mississippi, to join in this appeal cannot be allowed.

POINT I.

Appellant, doing an insurance business, and thereby subject to plenary State jurisdiction, having been paid a premium for the obligation as enforced by the State Court is not, on this record, entitled to raise a Federal question, with this premium in its pocket.

Section 5129, Code of Miss., 1930 (Sections 2550, 2557, Code of 1906), makes Surety Companies transacting business in Mississippi, insurance companies.

Section 5131, Code 1930 (Section 2563, Code 1906), gives all such contracts a Mississippi *situs*. *Fidelity, etc., Co.* v. *Miazza*, 93 Miss. 18, 46 So. 817.

As said in *Insurance Co.* v. *Yates*, 214 Ill. 272, 73 N. E. 423:

> *"It"* (insurance) *"is a public necessity that deals in its own credit for a cash consideration from the assured, and is stamped with public interest, and must yield obedience to the necessary and proper regulations by the State in the exercise of its police power."*

In *U. S. F. & G. Co.* v. *Citizens State Bank*, 150 Miss. 386, 116 So. 608, Mr. Justice Pack said:

> "* * * This being a fidelity bond, it is now well settled that such contracts are to be construed by the same principles of law applicable to contracts of insurance."

United States, etc., Co. v. *United States*, 191 U. S. 422, 48 L. Ed. 245; *Home Insurance Co. of N. Y.* v. *Moore*, 151 Miss. 189, 117 So. 524; *United States Fidelity & Guaranty Co.* v. *Hood*, 124 Miss. 548, 87 So. 115; 15 A. L. R. 605; *Murray* v. *Metropolitan Life Ins. Co.*, 145 Miss. 266, 110 So. 660; *Hormel* v. *American*

Bonding Co., 35 L. R. A. (N. S.) 513 (monographic note).

The rule is thus stated in *American Surety Co.* v. *Pangburn*, 182 Ind. 116, 105 N. E. 769, 770:

> "* * * The overwhelming weight of recent American authority does not accord such surety the right to invoke the rule of *strictissimi juris*, but places such contract in the insurance class and measures the right of such surety by the law applicable to insurance contracts. *United States Fidelity & Guaranty Co.* v. *Poetker*, 180 Ind. 255, 102 N. E. 372, and authorities cited; Monographic note to *Hormel & Co.* v. *American Bonding Co.*, 33 L. R. A. (N. S.) 513."

In *Lackland* v. *Renshaw*, 165 S. W. 314, 315, the Court said:

> "* * * While such corporations may call themselves 'surety companies', their business is in all essential particulars that of insurance. Their contracts are usually in terms prescribed by themselves. * * *"

Therefore, being engaged in the business of insurance, as to appellant, the Legislative power is admeasured by *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, 58 L. Ed. 1011; *O'Gorman* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 75 L. Ed. 324, 72 A. L. R. 1163, 51 Sup. Ct. 130; *Tyson* v. *Banton*, 273 U. S. 418, 434, 71 L. Ed. 718, 724; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, October Term, 1931, U. S. Supreme Court Advance Opinions No. 3, page 65; *Herbring* v. *Lee*, 280 U. S. 111, 74 L. Ed. 217.

As was said by Mr. Justice McKenna in the *Lewis Case, supra:*

> "We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.' It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling, if not compelling it."

The appellant does not show what premium it exacted from the owner for the obligation hereunder assumed, that is to say, whether this premium received covered compensation exacted by appellant for the payment to the subcontractors, as by the Mississippi court held; or did not. The form was taken from Louisiana (Opinion of Ethridge, P. J., Tr., 88). In Louisiana, the obligation to give a bond for payment to subcontractors is compulsory. Act 298, Laws of 1926. Without question, recovery to subcontractors therein have been in all instances, vouchsafed. *Stewart* v. *Segal,* 126 So. 718, 13 La. App. 359; *McDonald* v. *H. Gas & Oil Co.,* 2 La. App. 241; *Baton Rouge Sash, etc., Co.* v. *Deceur,* 2 La. App. 129; *Jarbart* v. *U. S. F. & G. Co.,* 3 La. App. 525.

And the surety under the Louisiana law knew that claims of materialmen against the surety on the contractor's bond were not affected by a breach of contract by the owner. *Fidelity Homestead Assn.* v.

Kennedy, 158 La. 1059, 105 So. 64. And further well knew when using this form that the surety on a contractor's bond is limited to defenses that can be made by the contractor in a suit for materials furnished to contractor. *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.*, 163 La. 1, 111 So. 470.

The appellant well knew the contrariety of judicial opinion, and being an insurance company did not disregard the possibility of this imposition and, with deference, exacted a premium therefor which having been collected imposed this liability to subcontractors. *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. (Fla.) 851.

Thus, so knowing, appellant computed the premium exacted. It is not herein shown that the premium herein exacted for the covenant undertaken was not the full premium requisite under the Louisiana law to make payment to all subcontractors and as enforced by the Mississippi court. If so, then, when in virtue of this payment, so thus exacted to cover this obligation to subcontractors as to materialmen, precisely as in case of Government contracts, the appellant is estopped to raise the Federal question, when it has in its pocket the premium requisite to pay therefor; to allow it to escape the payment would be to donate to the appellant, an insurance company, something to which it was not entitled. Having received the benefit in the form of this premium for the assumption of the obligation, it may not contest it. *Frost* v. *Corporation Commission*, 278 U. S. 531, 73 L. Ed. 492; *United Fuel Gas Co.* v. *Railroad Commission*, 278 U. S. 307, 73 L. Ed. 395; *Wall* v. *Parrott Silver & Copper Co.*,

244 U. S. 407, 61 L. Ed. 1229; *Leonard* v. *Vicksburg, etc., R. Co.*, 198 U. S. 416, 49 L. Ed. 1108.

Being a paid surety, engaged in the insurance business, and its obligation to the materialmen being conditioned by its exaction of the owner for the undertaking had, the right of such appellant to urge the unconstitutionality must be admeasured by the premium exaction, whether, irrespective of the constitutionality or unconstitutionality, it exacted of the owner the full premium covering the unconditional payment as above delineated, it may not, having so thus exacted, complain of the act being unconstitutional, especially as it assumed to make the bond conditioned as by law required, which might well be valid as a common law obligation independently of the statute. *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574.

In *Byram Lumber & Supply Co.* v. *Page*, 109 Conn. (1929) 256, 146 A. 293, it is said:

> "It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve."

U. S. F. & Co. v. *United States*, 191 U. S. 416, 24 S. Ct. 142, 48 L. Ed. 242, 246; *Algonite Stone Mfg. Co.* v.

F. & Dep. Co. of Maryland (Kans. 1917), 163 Pac. 1076, 100 Kans. 28.

There is no pretense here that the amount paid by the owner for this bond was any different from what would have been exacted for a contract in behalf of the United States Government whereunder this precise obligation here enforced was inherent. The surety company, thus doing business for profit, must have admeasured its premium so as to cover the contingency for satisfaction of subcontractors, and having thus received a premium therefor, may not under Mississippi decisions pay losses upon a different basis. *Insurance Company* v. *Shlenker*, 80 Miss. 667, 32 So. 155, where it is declared:

> "It might decline the insurance if it did not wish to run the moral risk in such a case. The very life of the statute is that the company shall not receive premiums on one basis, and pay losses on another."

And it not being shown that the premium exacted did not cover the payment to subcontractors, this paid surety may not be discharged because proof of damage conditions release generally. Compare *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *City of Philadelphia* v. *Fidelity & Deposit Co.*, 231 Pa. 208, 80 Atl. 62; *Murray City* v. *Banks*, 219 Pac. 246, 248; *Standard Salt & Cement Co.* v. *Nat. Surety Co.*, 134 Minn. 121, 158 N. W. 802; *United States* v. *U. S. F. & G. Co.* (C. C.), 178 Fed. 721.

So, where appellant, as an insurance company, contracted, as it did, for a consideration to it paid, know-

ing the contrariety of judicial decisions upon this subject, and knowing that the form utilized from Louisiana required the payment specifically, it may not as a paid surety seek exculpation without a demonstration that the premium exacted did not cover the risk inherent to payment of the subcontractors precisely as was contemplated by the Louisiana statute whereon the bond was drawn, and as held by the Mississippi Court. It not appearing, therefore, that appellant is now required to do other than that wherefore it exacted premium, it, as an insurance company, may not herein complain. The rights that appertain to a private individual may not be claimed by a corporation when dealing in a business affected with a public use. Compare *Blake* v. *McClung*, 172 U. S. 239, 43 L. Ed. 432; *Herbring* v. *Lee*, 280 U. S. 116, 74 L. Ed. 221; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden*, *supra*.

POINT II.

Section 3, Chapter 128, Laws of 1918, does not violate the Federal Constitution, in that, Appellees, materialmen, having placed their property—material—in a building upon the land of the owner, for whose construction, including both material and labor, appellant, surety company, had become responsible, the State can, in virtue thereof, impose liability upon such paid corporate surety, voluntarily executing a performance bond.

We advert to, by reference, that appellant was in the insurance business for a consideration pursuant to

permission therefor granted by Mississippi under its plenary power. Unless appellees receive from appellant pay for their material integrated into a structure wherefor appellant was responsible—bound to deliver it as an entity free of liens—they will go unpaid.

In Mississippi, initially, the sole protection provided materialmen was found in Section 3074, Code of 1906, whereunder immediately, when the contract was made the contractor might assign and defeat all rights of the materialmen. *Spengler* v. *Lumber Co.*, 94 Miss. 780, 48 So. 966. And therein the differentiation was made between the New York theory of subcontractors' rights and the Pennsylvania theory, and with reference to said section, it was remarked:

> "*This section might have provided, if the legislature had preferred the Pennsylvania system, that no assignment should be made by the contractor which would be good against the materialmen;* but it did not so provide. It might have expressly given the materialmen and the subcontractors, as the Pennsylvania system does, direct liens, equal in all respects to the lien of the original contractor; but it expressly refused to do that."

In *Dickson* v. *U. S. F. & G. Co.*, 117 So. 248, 150 Miss. 864, Mr. Justice Anderson said:

> "Prior to the adoption of chapter 128, Laws of 1918, Hemingway's Code 1927, Sections 2596 to 2603, inclusive, money due a contractor under a building contract was not impressed with any trust or equity in favor of materialmen and laborers furnishing materials and labor going into the construction of a building. Such funds,

> under the contract, belonged to the contractor absolutely, who had the right to assign or otherwise dispose of them as he saw fit, although to the prejudice of such laborers and materialmen. * * * But that is not true now since the adoption of that statute unless the contractor gives the bond provided by section 3 of the statute (section 2598, Hemingway's Code 1927), quoted above. If the contractor does not give the bond provided by the statute, laborers and materialmen have an equity under section 1 of the statute, Hemingway's Code 1927, Section 2596, in the funds due the contractor by the owner of the building. *But where the bond is given as provided by the statute, such funds are released from such equity or trust in favor of materialmen and laborers and go into the hands of the contractor untrammeled.* The purpose of the bond section of the statute was to provide for the protection of materialmen and laborers, the bond being in lieu of their equity in the funds arising out of the building contract. *The bond provided by the statute has the same purpose and effect as the bond required of a contractor doing public work by section 1, chapter 217, Laws of 1918 (Hemingway's Code 1927, Section 2617).*" (Italics ours.)

This is a direct decision putting this bond upon the precise basis made available by Congress and uniformly enforced without question by this Court.

See, also, *Davis Co.* v. *D'Lo Guaranty Bank,* 133 So. (Miss. 1931), 223.

At the same session of the Legislature, Chapter 217, Laws 1918, was enacted imposing precisely the same obligation in favor of material on public work—the validity of which appellant here concedes.

Compare *Commercial Bank* v. *Evans,* 145 Miss. 643, 112 So. 482, where the Court said:

> "The statute wrote into Owen's bond the condition it required to be in there. The statute is mandatory. The obligor and the obligee, as well as the sureties on the bond are presumed to have known what the statute requires when the bond was executed. The bond having been executed, and having accomplished its purpose, the law will write into the bond what it requires should be written. In other words, in the execution of a bond by a contractor to do public work, so far as the condition of the bond is concerned, the law takes care of that, and makes it what it should be."

McElrath v. *Kimmons,* 146 Miss. 775, 112 So. 164; *Stowell* v. *Clark,* 152 Miss. 32, 118 So. 370.

In *Standard Oil Co.* v. *National Surety Co.,* 143 Miss. 841, 107 So. 559, Mr. Chief Justice Smith said:

> "It is true that the bond here in question does not provide on its face that the Clark-Hunt Contracting Company shall promptly make payment to all persons supplying labor or material for the work to be done by it for the drainage district, but it does expressly provide for the performance by the Clark-Hunt Contracting Company of all 'the matters and things' contained, set out, or referred to in its contract with the drainage district, one of which is that it 'shall discharge all claims for work done and materials furnished in the prosecution of the work', and shall furnish the drainage district with evidence that 'all persons who have done work or

> furnished material under this contract have been fully paid for such work or material.' *The performance of this stipulation of the contract is, therefore, one of the obligations of the bond executed by the Clark-Hunt Contracting Company to insure the performance by it of its contract.* The statute does not require the obligation that such contractor shall promptly make payments, etc., to be written in the bond. It simply requires such payments to be one of the obligations of the bond." (Italics ours.)

So when the bond here sued on was thus executed, making reference specifically to the obligations required by the contract, under this decision, these contractual obligations were integrated into the bond as definitely as if there placed at length. Insofar as a paid surety is concerned there is, with deference, by counsel's concession of the validity of such a law as to public contracts, an end of this litigation, for *quoad* the paid surety, the subcontractors in each case, with deference, from a constitutional viewpoint, occupy precisely the same position.

Further, this statute has been in effect nearly 15 years and has been so frequently enforced in Mississippi as to make a conscious disregard thereof by a contracting insurance company an impossibility, especially, when it came to fixing the premium, Point I, *supra.*

As above pointed out, by Section 30 of Specifications (Tr., 16-17), dealing with the obligation of contractors and subcontractors, it was declared that he should

> "pay the cost of any required recordation of the contract and bond and the cost of any required cancellation of the same. *He shall also*

secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract."

"The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect the Owner against all liens or claims that may be filed against the building according to the Laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary" (Tr., 22). (Italics ours.)

Of course the Louisiana Statute, as law, had no extra-territorial effect, but privileges, as such, concursus proceedings, as such, and recordation, both of the bond and the contract, especially to "secure and pay for lien and privilege certificate * * * before final payment * * * under this contract," imported, *by agreement* of the surety, that obligation imposed by law in Louisiana, which in Mississippi became a contractual obligation. Thereasto, Act No. 298, Laws of 1926, of Louisiana, specifically provided by Section 2 that the owner was required to have a good and solvent surety and "the bond shall be attached to and recorded with the contract", providing therefore.

Section 3 of said Act No. 298 provides:

"Where the owner has required the bond herein provided, the said surety thereon shall be liable *in solido* with the contractor for all labor and materials used in said work of improvements and the cost of recording valid liens

> up to the amount of the bond, and the cancellation and erasure of the inscription of said contract, as hereinabove provided, shall not effect the liability of the said surety on said contract for such labor and materials, as to which labor and material said surety shall be bound to the same extent as the said contractor, undertaker, master-mechanic, or engineer, or other person undertaking such work."

Again, by Section 6, of said Act No. 298, in case of an insufficient bond, the owner was personally liable.

Under Section 8 of said Act No. 298—

> "A building contract may provide for partial payments as the work progresses and any payment made by the owner strictly in accordance with the contract shall absolve him from further liability, provided that he has exacted the bond and has recorded the contract and bond as required by this act."

Under Section 10 of said Act No. 298 the concursus proceedings are provided for and thereunder the attorney's fee is fixed, but thereasto the subcontractors are given preference, it being provided:

> "Any surety so desiring may invoke the concursus proceedings herein authorized by proper proceeding in court and by depositing in court at the time of the filing of the proceeding the full amount of the bond, provided that after the case is at issue such surety may withdraw with the permission of the court all of the deposit made except sufficient to cover the claims made in the concursus and twenty-five per cent additional thereto."

So, when appellant, a paid surety, had this contract executed in Mississippi, imported from Louisiana, he

was well acquainted with that thereunder required, and this Section 30 (Tr., 17), in addition to the unanswerable position taken by our own Supreme Court, and pointed out in our Motion to dismiss this appeal, demonstrating that appellant knew the possible liability, and knowing, contracted with reference thereto.

Therefore, that here in issue is Section 3 of said Act (Code 1930, 2276), whereunder:

> "In the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond,"

namely, a provision,

> "for the payment of the claims of persons furnishing labor or material."

Point III.

Said Chapter 128, Laws of Mississippi, 1918 (Secs. 2274-2281, Code 1930), does not violate the Federal Constitution.

In *Parsons v. U. S. F. & G. Co.*, 112 So. 469, 147 Miss. 335, McGowan, J., reviewed the decisions, saying:

> "Counsel for appellant really bases his contention that the statute is unconstitutional upon the theory that section 3 of the act (chapter 128, Laws of Mississippi of 1918), abridges liberty

of contract, and cites *Gibbs* v. *Tally*, 133 Cal. 373, 65 P. 970, and the cases from that court which follow it, to wit, *Shaughnessy* v. *American Surety Co.*, 138 Cal. 543, 69 P. 250, 71 P. 701; *Montague & Co.* v. *Furness*, 145 Cal. 205, 78 P. 640; *San Francisco Lumber Co.* v. *Bibb*, 139 Cal. 192, 72 P. 964; *id.*, 139 Cal. 325, 73 P. 864; *Equitable Life Ins. Co.* v. *Stemmons* (Tex. Civ. App.), 239 S. W. 1039; and he also relies on *Hess* v. *Denman Co.* (Tex. Civ. App.), 218 S. W. 162, from the Texas court.

"The *Gibbs* v. *Tally Case, supra*, is the leading case relied upon and urged by counsel for the position that the act here in question in unconstitutional. In that case there was a claim of materialmen against the owner. The statute applied alike to the contractor and owner. The court said that it compelled the *owner to become responsible for a liability he had not incurred*, and *which was not for his benefit;* that it practically forbade him from improving his property by letting a contract unless he became liable therefor or furnished sureties who would be so liable.

"The California statute above cited required that the contract, if not filed, was void, and the effect of the statute was to make the contractor the agent of the owner. Counsel says this California statute is very similar to ours, but we are unable to trace any essential similarity save that it requires a bond to be taken, whereas our statute permits a bond to be taken by the owner.

"The statute we have under review does not require the owner to protect himself with a bond. It only provides that, if he takes bond, having put all the stipulations in the contract he desires, that the bond must inure to the bene-

fit of the laborers and materialmen, not in violation of the obligee's rights, but subservient thereto, and we are unable to perceive that the requiring of this stipulation in this bond is other than for the benefit of the owner and requires the contractor to do that which *he was legally and morally required to do, pay his debts, and the surety, with the law staring him in the face, may or may not thus undertake the indemnity of his principal, for the surety's right to contract is not impaired nor is his liberty to contract abridged or interfered with.*

"In the case of *Hess* v. *Denman Lumber Co.* (Tex. Civ. App.) 218 S. W. 162, a Texas statute providing for and requiring a bond to be taken by the owner from a contractor to secure performance of a building contract was declared unconstitutional, the court saying, in effect, in that case, that the provisions of the Revised Statute of 1911, art. 5623, as amended by Acts 1915, c. 143, requiring owner to contract with builder to give a bond conditioned as required by article 5623*a* as added by Acts of 1915, c. 143, was held void, being an interference with constitutional liberty of contract. Said statute specifically provided that the owner shall cause to be executed a written contract for the erection, etc., and shall also cause to be executed and filed with the county clerk, before the work is begun, a good and sufficient bond, and further provides that said bond shall inure to the benefit of materialmen, laborers, and the subcontractor, regardless of whether or not they are secured by any lien. The court said:

" 'But the law requires the owner to contract with the contractor to give a bond. It is compulsory contract purely. We think that it is

beyond the power of the Legislature to require an owner to contract with the contractor to give a bond, as done in this very act, because it is interference with the law of the liberty of contract. If the owner does contract to have the contractor give a bond, he is at liberty to do so as a subject-matter of contract; but if the owner does not so contract, a personal judgment cannot be rendered against him for not requiring the bond of the contractor.'

"It will be observed that this opinion is from the Court of Civil Appeals of Texas, Texarkana, and in the case of *Equitable Insurance Co.* v. *Stemmons*, 239 S. W. 1039, the Supreme Court of Texas denied a writ of error to the Court of Civil Appeals, which had followed the Texarkana court in *Hess* v. *Denman* in holding that the statute requiring the owner of the property to execute a bond was unconstitutional, and the declination by that court of the writ of error was tantamount to the approval of the decision rendered by the Court of Appeals in *Hess* v. *Denman, supra*, that the statute was void.

"The obvious distinction between our statute, section 3, and the Texas statute, is that our statute does not undertake, in any wise, to require the owner to demand and receive a bond for the performance of his contract, so that we do not think the Texas cases are authority upon which we could rely in this case.

"On the other hand, the weight of authority sustains the validity of this statute. In the case of *Roystone* v. *Darling*, 171 Cal. 526, 154 P. 15, an act, very much more similar to ours than the one considered in the Tally Case, was very vigorously challenged and held to be constitutional by the California court, with the Tally Case, the Shaughnessy Case, and the other cases

following the Tally Case in mind, and with express reference thereto, and the statute of 1911, considered in the Roystone Case, contained a provision for a bond to be furnished by the contractor to the owner. The court, speaking of this latter statute, says:

"'The law of 1911 here involved does not deprive the owner of the right to contract for the improvement of his property. It allows him to contract freely for such improvement and upon such terms as he may deem for his best interests. All it exacts from him, as a condition of such exemption from liability, and in order to make his contract effective, is that he shall provide a reasonable security for the constitutional lien given for labor and materials furnished to his contractor. It is not an unreasonable burden. It is one which we think the people have the power to impose and which we believe to be within the scope of the constitutional mandate in the section conferring such liens, and of the police power. * * *

"'We are unable to perceive any constitutional objection to the expedient of providing that by the execution and filing of such bond the owner may be protected against the delinquencies of his contractor while, at the same time, lien claimants are afforded a security for the payment of their claims. We therefore hold that the foregoing decisions are not applicable, and that the provision for requiring this bond is not unconstitutional or invalid.'

"So that, the last utterance from the California court would be authority for upholding the constitutionality of this act, upon a statute more clearly like ours than the one declared unconstitutional in the Tally Case.

"Our investigation leads us to the conclusion that most of the appellate courts of this country, including the Supreme Court of the United States, have held that the *liens granted by the Legisature to subcontractors, mechanics, and materialmen, upon the land of the owner, are valid although the owner had no contractual relations with this class, and we think these are persuasive to sustain us in our view that the classification of mechanics, materialmen, and laborers as a class to be favored by the Legislature is not an arbitrary classification, but is reasonable, and has for its object the welfare of the country at large, and quite generally recognized as valid.* Especially is that true when we consider that on every hand by the thousands these contracts are multiplying, and such a vast number of our citizens are engaged as subcontractors, materialmen, and mechanics, and this class has been greatly augmented within the past decade. And especially is this true of our own state, where the sovereign itself is engaged in greater building enterprises than, perhaps, ever before in any one period, and from every hamlet, city, and town there comes the ring of the anvil, the tap of the hammer, and the music of the saw, as they vie with each other in general construction and improvement work.

"Building and construction is an essential under modern progressive conditions to the maintenance of commerce. Credit is as essential here in this line of endeavor as in other avenues of commerce. If the master workman or contractor were not assured of credit, then the surety would be called on in many instances to extend the credit so necessary to continued progressive movement or else complete the contract.

"A review of the authorities on the validity of the mechanics' and materialmen's lien would seem to be unnecessary. The essence of these decisions is to the effect, first, that the labor and material used in building are for the direct benefit of the owner for which the property improved should be liable; second, that he is presumed to contract with full knowledge of the law, and he has the power to protect himself against loss by safeguarding the fund necessary to pay for the labor and materials. These expressions of the courts generally answer every attack made upon the constitutionality of these laws respecting a lien upon the land of the owner. It is difficult to differentiate a statute giving a lien on property of the owner and a statute providing that the owner may, if he sees proper, take security by requiring a bond for the faithful performance of the contract, and that when such bond is taken (he may take it or not as he pleases), such bond shall stand as security for the payment of the materialmen and mechanics and an action be brought thereon inuring to the benefit of this class.

"In the case of *Great Southern Fireproof Hotel Co.* v. *Jones*, 193 U. S. 532, 24 S. Ct. 577, 48 L. Ed. 778, the Supreme Court of the United States held that liberty of contract is not unreasonably interfered with, nor is property taken without due process of law, by the provisions of Ohio Rev. Stat. Sections 3184, 3185, and 3185*a*, giving a lien on the property of the owner to subcontractors, laborers, and those who furnish materials to be used by the contractor in the execution of his contract with the owner; and this, too, at a time when the Supreme Court of the United States was advised that the Ohio Supreme Court had declared

these statutes to be invalid and unconstitutional. The court devoted but little space to that question, but expressly approved the opinion of the Circuit Court of Appeals in the case then under review and *the opinion written by Judge Lurton, who cogently stated the reasons in support of the constitutionality of this statute, and cited Jones* v. *Great Southern Fireproof Hotel Co.*, 86 *F.* 371, 30 *C. C. A.* 108. We also cite that case as being in favor of the constitutionality of the statute here under review, there being no such interference with 'liberty of contract' contemplated by the Fourteenth Amendment in the statute here under review as to warrant this court in declaring it invalid. The reasoning and logic in support of the mechanics' lien statute is just as strong, just as cogent, just as powerful, and just as applicable to the statute here requiring that if a bond be taken by the owner to secure performance of the building contract, that it shall contained a stipulation protecting the materialmen and laborers subordinate to the rights of the obligee in the bond.

"The case most nearly in point is that of *Rio Grande Lumber Co.* v. *Darke*, 50 Utah, 114, 167 P. 241, L. A. A. 1918A, 1193. Passing upon the validity of the Utah statute which requires the property owner when contracting for the erection of a building to take a bond to himself for the benefit of every person interested, and the Supreme Court of Utah stated that it was unable to find any reason for declaring the statute in question unconstitutional; they reviewed at length the California cases, and, quoting from the main California case, the Utah court said:

" 'The statute does not say who shall cause this bond to be executed, nor to whom it shall,

in form be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event.'

"And the Utah court proceeds, to say, in effect, that the points made in the above quotation constitute the principal objection of the California court to the statute, and called attention to the fact that no portion of the above criticism could be justly applied to the Utah statutes. The court discussed the *Roystone Case*, a later California case, and, after comparing and conceding the analogy between the materialmen's statute and the bond statute, the court comes to a conclusion in the following language:

" 'The bond, as in this case, is conditioned for the faithful performance of the contract and securing the payment of laborers and materialmen. If the owner requires the contractor to procure the statutory bond, he is protected against loss. If he does not, he becomes liable to laborers and materialmen if the contractor fails to pay them, even though he may have paid the contractor in full. He has his remedy in his own hands. Under the Mechanic's Lien Law, if he fails to hold the fund for the payment of laborers and materialmen, the same misfortune may occur. To use the epigrammatic expression of respondent's brief: 'Under the bond statute he must take care to exact the bond, and under the lien statute he must take care to hold the fund.' We are unable to find any reason for declaring the statute in question unconstitutional. Certainly, to say the least, reasonable doubts as to its unconstitutionality,

> after thoroughly considering the question, are such as to render it the imperative duty of the court to declare the statute valid as against the objections made. It is ordered by the court that the judgment be affirmed.'
>
> "When we consider that in the instant case this last-mentioned rule of construction must control where the constitutionality or validity of the statute is involved, then it is just as binding upon us as any other rule; and after fully and fairly considering the powers of legislative bodies, and the limitation of their power under the Constitution, if there is a reasonable doubt in the mind of the court, then that doubt must be cast in favor of the validity of the act."

And citing to approve *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. Ed. 606.

The only case cited by opposite counsel not specifically reviewed in *Parsons* v. *U. S. F. & G. Co.*, 112 So. 469, 147 Miss. 335, *supra*, is *Kelly* v. *Johnson*, 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N. S.) 573; but that decision assumed only to follow a prior decision of Ohio, in *Palmer* v. *Tingle*, 45 Ohio St. 423, 45 N. E. 313; a Michigan case, *Spry Lumber Co.* v. *Murphy*, 148 Pa. St. 337, 23 A. 1134.

Mr. Justice Harlan, in *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 547, 48 L. Ed. 788, dealing with the precise question said:

> "We are constrained to withhold our assent to the views expressed by the Supreme Court of Ohio, and to express our concurrence with the circuit court of appeals. The great weight of authority in this country as to the meaning and scope of constitutional provisions substan-

tially like those to be found in the Constitution of Ohio is, in our opinion, against the conclusion reached by the learned state court. Exercising an independent judgment on the subject, we are obliged to so declare. The reasons in support of the constitutionality of the statute are cogently stated in the able and elaborate opinion of Judge Lurton, speaking for the circuit court of appeals in this case. *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371. *As the reports of the decisions of the circuit court of appeals are accessible to all, we will not encumber this opinion with a restatement of the grounds, so fully set forth by that court, on which the validity of the statute must be sustained. We content ourselves with referring to its opinion, and with citing in the margin some authorities which, in our judgment support the views expressed by the circuit court of appeals. It results that the decree must be affirmed.*" (Italics ours.)

Therefore, dealing with the Federal Constitution—the State Constitution being here eliminated, we have the decision of this Court condemning the reasoning of the Illinois Court as to Section 21 of the Act there involved. The proper rule being declared in the case of *Great Southern Fire Proof Hotel Co.* v. *Jones*, 193 U. S. 532,, 48 L. Ed. 778, approving an opinion by Mr. Justice Lurton in *Jones* v. *Great Southern Fire Proof Hotel Co.*, 30 C. C. A. 108, 58 U. S. App. 397, 86 Fed. 371, which case, especially the opinion in the Court of Appeals, adopted by this Court, is conclusive of the point here at issue.

After a thorough review of all cognate cases, Judge Lurton, later Mr. Justice Lurton, laid down the theories whereunder this legislation might be constitutional thus:

> "In neither of these cases, though the amounts involved were great, was any constitutional objection to the statutes giving the lien suggested, though very eminent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text writers. 2 Jones, Liens 286; Phil. Mech. Liens, Sec. 30; Boisot, Mech. Liens, Sections 22, 23. Overton on Liens (section 553) has been cited as advancing a contrary view. If we had doubt as to whether such statute was 'due process of law,' or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation, unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of government. Such statutes have met with the approval of the legislative bodies of nearly every state in the Union, as well as of Congress, as indicated by the Act of 1833, construed in *Winder* v. *Caldwell,* 14 How. 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.
>
> "But the validity of such statutes need not be rested upon mere authority. They find

sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any agreement the common law gave to one who, by his labor or expense, has made, preserved, enlarged, or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So, we find another illustration in the lien given one who, in the exercise of a quasi public employment, is required to receive or perform some service in respect to the thing upon which the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter, and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That wide class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him, and therefore fastens upon the thing, or that into which

it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction, although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished by a mortgaged railway company to keep it in operation, and preserve the property for the benefit of all interested.

"Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a bona fide and mala fide possession. *Green* v. *Bidle*, 8 Wheat. 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements, which had actually increased the value of the land. Courts of equity, therefore, soon applied the principle that, where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvements were in good faith. 2 *Story, Eq. Jur.*, Sections 799a, 799b, 1237, 1239.

"In *Bright* v. *Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, and same case in 2 Story, 605, Fed. Cas. No. 1,876, Justice Story laid down the broad doctrine that a bona fide purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after deducting rents and profits; and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in *Valles' Heirs* v. *Fleming's Heirs*, 29 Mo. 152, *Association* v. *Morrison*, 39 Md. 281, and *Hatcher* v. *Briggs*, 6 Or. 31, though it cannot be said to have received any very general support, though often cited. The reason is doubtless found in the fact that the equities of bona fide purchasers of defective titles were so generally recognized as to result in statutes in most of the states, called 'betterment' or 'occupant' statutes, which provide that a bona fide occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will, and which he might not desire, the courts have sustained their constitutionality, as giving remedy where before there had been none, though a strong equity existed. *Cooley, Const. Lim.* 486 *et seq.*; *Brown* v. *Storm*, 4 Vt. 37; *Ross* v. *Irving*, 14 Ill. 171; *Griswold* v. *Bragg*, 48 Fed. 519; *Hunt's Lessee* v. *McMahan*, 5 Ohio, 132; *Scott* v. *Mather*, 14 Tex. 235; *Davis* v. *Powell*, 13 Ohio 308; *McCoy* v. *Grandy*, 3 Ohio St. 463; *Bacon*

v. *Callender,* 6 Mass. 303; *Welch* v. *Wodsworth,* 30 Conn. 149; *Whitney* v. *Richardson,* 31 Vt. 300. The constitutionality of a similar Tennessee act was denied in *Nelson* v. *Allen,* 1 Yerg. 376, but Chief Justice Catron, in a note says the question did not arise.

"Not only was the equity so broadly declared and enforced by the civil law, but in that system of law very high consideration was given to all who had, by their contributions, benefited, preserved, or enlarged the estate or property of another; and, among creditors secured by a common pledge or mortgage, those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and, among this class, those whose contributions were last given and used had the preference. *Mackeldy, Rom. Law,* 280, 281.

"Domat says:

"'Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges.' *Domat Civ. Law* (by Strahon) 681.

"Thus, he who had sold an immovable thing was privileged for the price, before the creditors of the purchaser and all others, as to the thing sold. So, he who loaned money to a purchaser to pay the purchase price had the same privilege as the seller would have had till he had been paid. He who loaned money to preserve the thing, or to make an improvement of an estate, had a like privilege. Id. 682, 683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement, or creation of an improvement on land. This privilege is thus stated in Domat (page 683, Section 1744):

"'Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of works, and which the seller has for the price of the thing sold.'

"None of these instances, from either the civil or common law, of a charge of preference, are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or material man, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who, by his labor or materials, has benefited the owner, and has acquired, therefore, an interest in the property benefited, to secure his just compensation. In most instances it is well understood that the contractor will employ others tc aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others an independent lien was given to all who should, at the instance of

the owner or his contractor, contribute towards the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. 'The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect.' *Edwards* v. *Kearney*, 96 U. S. 595; *Greenwood* v. *Freight Co.*, 105 U. S. 13; *Denny* v. *Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith* v. *Parsons*, 1 Ohio, 236; *Weil* v. *State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows

what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Inst. for Savings* v. *Jersey City,* 113 U. S. 506-514, 5 Sup. Ct. 612.

"If, then, this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purpose of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure those who, by their labor or materials, have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another would be fatal to the legislation, as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims, the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor, it is his own fault. That the liability of the owner in respect to building contracts is restrained in some degree

by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or materials at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity, the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive; nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would be futile to them, and disastrous to the owner. A law which has for its basis equitable principles, which in all times and in all ages have had recognition, cannot be arbitrary and oppressive to the straints upon liberty of contract are constantly met with in the legislation of every state. Statutes requiring certain contracts to be in writing or to be witnessed or acknowledged or registered, statutes regulating interest or the time within which rights may be enforced, and statutes exempting property from liability

to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contracts is afforded than the statute upheld by the Ohio Court in *Weil* v. *State,* 46 Ohio St. 450, 21 N. E. 643. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

"The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who, by his labor and materials, had contributed to the betterment of another's estate, was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who, at the instance of the contractor, shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its en-

> actment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder. The decree of the circuit court must be reversed. The demurrer will be overruled, and the cause remanded for answer and further proceedings not inconsistent with this opinion."

This reasoning has the approval of this Court, and this case not adverted to by opposite counsel is conclusive of the validity of that hereunder assailed.

The owner was the Natchez Investment Company; it was the obligee in the bond. As such, it filed the original bill, wherein it averred this obligation upon the part of the appellant to pay, or, if it were mistaken in this obligation of the appellant, then to have adjudged invalid the assignment made by the principal contractor to the New Orleans Bank & Trust Co. The owner required this bond from Burkes, wherefor appellant was paid, and whereby appellant became bound unto the owner for the construction of a building containing the precise material furnished by appellees. Had Burkes, the principal contractor, defaulted the first day after the bond was signed, then thereunder appellant was obligated to complete precisely as Burkes has done, and in completing it would have incurred the obligation for this precise property now therein which was obtained therefor from appelless, and appellant would have been compelled to pay therefor in cash. Each brick laid by these appellees

pro tanto lightened appellant's burden and thereby was a *pro tanto* equitable consideration for payment.

There can be no question as to Burkes and his responsibility when the owner was at pains to see that the contractor and this surety, appellant, were to pay for the *recordation of the lien privilege certificate as well as the required recordation of the contract and bond and its release* (Tr. 16-17), imported from the Louisiana law. It is but proper to assume that the more important obligation to pay subcontractors thereunder to be obtained were specifically undertaken, especially in view of those conditions in the bond whereby appellant was at pains to escape responsibility for (5) destruction by fire, riot, mob, etc.; (6) guarantees of the work specified in the contract, and of its efficiency, its wearing qualities and for maintenance of or repairs thereto; and the payment of any damages or compensation either at common law or under any statute, Federal or State, arising from or growing out of injuries to persons or property; and for failure to procure insurance; and for (7) infringement of patents (Tr., 19, 20).

Where, as here, there is to be the placing by materialmen of their goods upon the land of another, at a contractor's instance, the law has almost universally stepped in and prescribed rights to materialmen.

Dealing with the alleged liberty of contract, this Court in *Hardware Dealers, etc., Co.* v. *Glidden*, U. S. Supreme Court Advance Opinions No. 3, page 65, October Term, 1931, said:

> "Without stopping to examine these contentions, we assume that appellant's freedom of

contract was restricted by operation of the statute, and pass directly to the question decided by the State Court; whether the Fourteenth Amendment precludes the exercise of such compulsion by the legislative power.

"The right to make contracts embraced in the concept of liberty quaranteed by the Fourteenth Amendment is not unlimited. Liberty implies only freedom from arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, 567. Hence, legislation otherwise within the scope of acknowledged state power, and unreasonably or arbitrarily exercised, can not be condemned because it curtails the power of the individual to contract. *McLean* v. *Arkansas*, 211 U. S. 539; *Schmidinger* v. *Chicago*, 226 U. S. 578; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389; *Erie R. R.* v. *Williams*, 233 U. S. 685; *Keokee Cons. Coke Co.* v. *Taylor*, 234 U. S. 224.

Further, he said:

"The records and briefs present no facts disclosing the reasons for the enactment of the present legislation or the effects of its operation, but as it deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; see *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Ohio ex rel Clarke* v. *Deckebach*, 274 U. S. 392, 397. We cannot assume that the Minnesota Legislature did not have knowledge of conditions supporting its judgment that the

legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded.

"Without the aid of the presumption, we know that the arbitration clause has long been voluntarily inserted by insurers in fire policies, and we share in the common knowledge that the amount of loss is a fruitful and often the only subject of controversy between insured and insurer; that speedy determination of the policy liability such as may be secured by arbitration of this issue is a matter of wide concern. See *Fidelity Mut. Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Farmers' & Merchants' Ins. Co.* v. *Dobney*, 189 U. S. 301; that in the appraisal of the loss by arbitration expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding.

"These considerations are sufficient to support the exercise of the legislative judgment in requiring a more summary method of determining the amount of the loss than that afforded by traditional forms. Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators cannot be deemed to be a denial of either due process or equal protection of the laws."

This statute has been in effect in Mississippi since 1918, and has been integrated consistently into the

obligations assumed by these companies in their dealings with the public, and when, as here, in order to obtain for Burkes, the contractor, the right to assign, transfer or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors and materialmen, and to discharge the equity against the owner *Dickson* v. *U. S. F. & G. Co., infra,* this bond was executed, the surety thereon having, under our decisions, vouchsafed to Burkes this right to assign to the New Orleans Bank, may not, having thus obtained from Burkes this right, now assert that thereby this right did not so thus exist.

The holding of the Supreme Court of Mississippi under Section 3, Chapter 128, Laws of Miss. 1918, is, that when the owner and/or materialman are deprived of the rights given by Section 2, which are conceded to be valid, that therefor and thereunder, Section 3 makes such bond so thus given, available. By such holding there is no deprivation of property without due process.

There are no factual elements presented by this record as to any of these appellees. The decisions of the Supreme Court of Mississippi are here, but it does not appear but that before any of the alleged defaults, whereby a discharge is claimed, the material had been in good faith delivered, and that sought by appellant is as to these materialmen an *ex post facto* deprivation by an act of the contractor or owner. Appellees are sought to have their rights taken away by defaults, wherefor appellees are not responsible.

Bonds of this character contain two several separate obligations: One to the obligee, and the other to those who are thereunder to be protected.

In considering this cause on the first appeal, on demurrer, the Supreme Court of the State of Mississippi in *Hartford Accident & Indemnity Company* v. *Natchez Investment Company, Inc., et als.*, 155 Miss. 31, 119 So. 366, page 369, held:

> "* * * Section 2 of the Act is challenged as impairing the right of a contractor to make contracts and to receive the price therefor, and dispose of it, as he sees proper, as a necessary incident to the protection of his business. Of course the Section does not prohibit the subcontractors, journeymen, laborers and materialmen from waiving such right or entering into contracts by which such rights are waived or otherwise provided for, but it does give rights to the subcontractors, journeymen, and laborers and materialmen against the funds due the principal contractor for the protection of their contracts with him, and in furnishing labor and material in carrying out his contract. The Legislature has the power to regulate the right of contract in a reasonable manner, so long as the right to contract is not destroyed or seriously impaired. The effect of the statute before us in the case named is similar to impounding money due to one person by a process of garnishment to the satisfaction of the claims of another person against the owner of such funds, and it has always been, as we understand it, permissible for the Legislature to provide remedies to parties furnishing labor and material, or in selling property, by providing liens

or other proceedings impounding the property or its proceeds."

As reasoned by the Court, the Legislature, having created a lien on right to lien in favor of materialmen and subcontractors, as it had a right to do, the Legislature then proceeded in Section 3 of the Act to provide for the benefit of the principal contractor a means and method by which the principal contractor could release and obtain the discharge of the proceeds of his contract from the effects of that lien.

The Act does not require the owner of the building, the contractor, or any surety to enter into and make the bond provided for in Section 3 of the Act, but does provide that if a bond be given, conditioned to guarantee the faithful performance of the contract, then, in that event, and under those conditions, the lien and lien rights of subcontractors and materialmen are discharged; but in the place of such lien or lien rights the subcontractors and materialmen are given another remedy for the enforcement of the payment to them for material and labor which have gone into the construction of the building, and, being so incorporated in the building, cannot be taken or otherwise charged with any other lien or lien right.

The Bond being given, the subcontractors and materialmen are, willy-nilly, deprived of the substantial and substantive right conferred upon them by Sections 1 and 2 of the Act, and, the Bond being given, such subcontractors and materialmen cannot complain of any disposition that may be made by the principal contractor of any of the proceeds of his contract. This being so, a surety who enters into a bond under the provi-

sions of Section 3 of the Act of its own volition and by the terms of the Act incorporated into its contract, takes from subcontractors and materialmen those substantive rights conferred by Sections 1 and 2 of the Act and offers its own faith and credit to the subcontractors and materialmen in lieu thereof.

Therefore, as the Mississippi Supreme Court has held in this and other cases, Section 3 of the Act is not unconstitutional, because the Act first does not require the Bond to be given in any event, and secondly, does not deprive any contracting party of the right to incorporate in the contract and bond such conditions and provisions as it may see proper—subject, however, to the one condition that, of course, there may not be incorporated in the Bond such conditions, terms and provisions as would nullify the bond as to the rights of subcontractors, laborers and materialmen. Thus to do would be to enable the contractor and surety to gain the advantage of releasing the proceeds of the contract from the effects of Sections 1 and 2 of the Act without in turn conferring upon subcontractors and materialmen the benefits of Section 3 of the Act.

> "The regulations of corporations for the public interest under the police power are valid whether the power to alter the charter has been reserved or not."
>
> (*Troy, etc., R. Co.* v. *Kerr*, 17 Barb. (N. Y. 1854) 581.)

Very stringent regulations of insurance companies have been supported under the police power, although

in such case the Court relied on the theory that, since the insurance company might have been excluded entirely, it could be allowed to write contracts only on such terms as the State might impose, even though they contained an element of hardship.

> "Thus the state may require a deposit of securities (*Paul* v. *Virginia,* 8 Wallace (U. S. 1869) 168; 19 L. Ed. 357); may force them to comply with the State laws in detail (*Hooper* v. *People,* 155 U. S. 648; 39 L. Ed. 297); may compel them to settle on the basis of the value of the policy rather than on the actual loss (*Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, 43 L. Ed. 552); may make policies valid even if erroneous answers were given, if not fraudulently given (*John Hancock Life Ins. Co.* v. *Warren,* 181 U. S. 73, 45 L. Ed. 755; *Northwestern Mutual Life Ins. Co.* v. *Riggs,* 203 U. S. 243; 51 L. Ed. 168); can regulate the forfeiture of policies for the non-payment of premiums (*N. Y. Life Ins. Co.* v. *Cramer,* 178 U. S. 389; 44 L. Ed. 1116); and can compel an insurance company to file a certificate before contracts. (*Commonwealth* v. *Hock Age Mutual Benefit Association,* 31 Leg. Int. 245; 10 Phila. 554. See, also, *Eagle Ins. Co.* v. *Ohio,* 153 U. S. 446; 38 L. Ed. 779.)"

The statute in question can be further upheld for the reason that it is designed to prevent fraud.

The basis of this law was laid down by the Federal Courts wherein it was decided that the State could compel foreign corporations to deposit securities before doing business within the State. (See *Paul* v. *Virginia,* 8 Wallace 168; 19 L. Ed. 357; *Hooper* v. *California,* 155 U. S. 648, 39 L. Ed. 297.)

Under the same principle residents of a State may have priority in cases of insolvency and the due process of law clause is not thereby violated, although the benefits and immunities of citizens of the United States are thereby abridged. (See *Blake* v. *McClung*, 172 U. S. 239 at 260, 261; 43 L. Ed. 432; *Seely* v. *American National Bank*, 178 U. S. 289; *McGoon* v. *Scales*, 9 Wall. 23; 19 L. Ed. 545; *Frowert* v. *Blank*, 205 Pa. 299, 54 Atl. 1000.)

So too, it has been upheld that the Legislature has ample power to prevent fraud by police regulations in the matter of blue sky laws. (*Hall* v. *Geiger Jones Co.*, 242 U. S. 539; 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stock Yards*, 242 U. S. 559; 61 L. Ed. 493; *Merrick* v. *Halsey*, 242 U. S. 568; 61 L. Ed. 498.)

As stated and dealt with in Mott in his "Due Process of Law"—Bobbs-Merrill Company, Publishers (1926), the Courts will sanction Legislative interference with private rights when there is a fair balance between the advantage which the public will derive from the statute and the degree of interference with private rights which it involves.

Where the degree of interference is slight the Courts, with unerring uniformity, will uphold the law as beneficial to the public, so where there was merely created a State fund which was held as a protection to the public against bankruptcy, etc., the Supreme Court of the United States has pointed out that all that was taken was the use of the money for a short time, a consideration which was negligible in view of the great public convenience. (Sinking Fund cases, 99 U. S. 700 at 721; 25 L. Ed. 496; *Thornton* v. *Duffy*, 254 U. S. 361; 65 L. Ed. 304.)

In the instant case the Legislature of Mississippi has seen fit to enact the legislation here under attack, and it was more familiar with the facts and circumstances which surround the subject of bonds and building contracts and with the necessities and occasion of the enactment of the laws in question than can one be who is a stranger to the circumstances and facts surrounding building operations in this State under the law previous to the enactment of the legislation in 1918.

As held in *Falbrook Irrigation District* v. *Bradley*, 164 U. S. 112 at 160; 41 L. Ed. 369, this legislative determination of issues in question concerning legitimacy of the legislative object will not be disturbed by the Court unless there has been a great abuse, and such determination goes beyond all reason.

> "The people of California and the members of her Legislature must, in the nature of things, be more familiar with the facts and circumstances which surround the subject, and with the necessities and occasion for the irrigation of the lands, than can anyone be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the State Courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State.
>
> "For these reasons, while not regarding the matter as concluded by these various decisions, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thoughts of the Court of that State on this question."
>
> *Falbrook Irrigation District* v. *Bradley*, *supra.*

So too, it has been held that the Legislature, in determining upon the passage of a law, may make investigations which the Court cannot. (*People* v. *Smith*, 108 Mich. 527; 66 N. W. 382; *Morris* v. *Columbus*, 102 Ga. 792, 30 S. E. 850; *State* v. *Main*, 69 Conn. 123, 37 Atl. 86.) A reading of the cases as pointed out by Mott in his work, *supra*, is to the effect that, during the second decade of the Nineteenth Century, the Courts concluded that if they were to properly judge the validity of the legislative object they must have some means of knowing the facts in the situation. Frequently these facts were local, and for the Courts to have an understanding of local situations was almost impossible.

For that reason this Court refused to go behind the legislative determination of pool hall regulations in the year 1912 in the case of *Murphy* v. *California*, 225 U. S. 623; 56 L. Ed. 1229, the Court holding that where the statute prohibited pool halls this Court would refuse to take up the question of whether pool halls were detrimental to public morals and that that was for the Legislature to decide and that this Court cannot go behind their findings and inquire into local conditions.

And, again, this Court refused to go into the question of regulation of competition to prevent unfair practices where the statute had prohibited sales at one place at a lower figure than at another where the purpose was to drive out competitors. (*Superior Lumber Co.* v. *South Dakota*, 226 U. S. 157; 57 L. Ed. 164.)

Shortly thereafter this Court laid down the doctrine that the burden of proof rests upon those who attack the validity of the object of a statute, declaring that,

> "The burden is on him who attacks the legislation and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that public welfare is not subserved by the legislation." (*Erie* v. *Williams*, 233 U. S. (1914) 685 at 699, 58 L. Ed. 1155.)

> "Where the legislation has usage to support its position it is much stronger" (*People ex rel.* v. *Murry*, 149 N. Y. 367 at 376; 44 N. E. 146; *People* v. *Schweiner*, 214 N. Y. 395; 108 N. E. 639).

In Mississippi the Legislature had knowledge as to the abuses which had gone on in the building trade and in the matter of the deprivation of rights of laborers and materialmen in the assigning of the contract price by the chief contractor.

These abuses were corrected by the Legislature in the legislation here under attack and the public need will be presumed by this Court, and the frauds which heretofore ran rampant throughout the State were blocked by the legislation now being sought to be overthrown.

Mr. Justice Clark affirmed the doctrine in the Chicago Billboard case when he declared that the Courts were disposed to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the high court of the State (*Thomas Cusack* v. *Chicago*, 242 U. S. 526, 61 L. Ed. 472).

The doctrine was again affirmed in *Hutchinson Ice Cream Company* v. *State*, 242 U. S. 153, 61 L. Ed. 217.

And again in the Queens Gas Company case, wherein the Court refused to review the facts, or even the reasonableness of an administrative order (*N. Y. ex rel McCall*, 245 U. S. 345, 62 L. Ed. 337).

The same principle was reaffirmed by this Court by Mr. Justice Day in the municipal fuel yard case, *Jones* v. *Portland*, 245 U. S. 217 at 221, 62 L. Ed. 252, wherein he as the organ of the Court said:

> "While the ultimate authority to determine the validity of legislation under the 14th Amendment is rested in this Court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

Mr. Justice McKenna rested the case of *Bunting* v. *Oregon* in no small degree on the same principles (242 U. S. 426, 61 L. Ed. 830).

Mr. Justice Holmes in the case of *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 256, said:

> "If the character or effect of the article so intended to be used be debatable, the Legislature is entitled to its own judgment and that judgment is not to be superseded by the verdict of a jury, or, we may add, by the personal opinion of the judges, upon the issue which the Legislature has decided."

The same proposition formed the chief justification given by Mr. Justice Day in upholding the non-partisan legislation of North Dakota, wherein the Court says:

> "What was or was not a public use was a question concerning which local authorities, legislative and judicial, had special means of securing information to enable them to form a judgment; and particularly that the judgment of the highest court of the State, declaring a given use to be public in its nature, would be accepted by this Court *unless clearly unfounded*" (*Green* v. *Frazier*, 253 U. S. 233 at 242; 64 L. Ed. 878).

It, therefore, must be concluded, that if presumption is to be engaged in to support the law and only clear and undemonstrated usurpation of power will authorize police interference with legislative action (*Green* v. *Frazier*, 253 U. S. 233; 64 L. Ed. 878). Other cases in which the Courts have deferred to the Legislature are: *Dominion Hotel Co.* v. *Ontario*, 249 U. S. 266; 62 L. Ed. 597 (Mr. Justice Holmes declared the 14th Amendment is not a pedagogical requirement of the impracticable) page 268; *U. S.* v. *Standard Brewery*, 251 U. S. 210, 64 L. Ed. 209; *State* v. *Cantwell*, 179 Mo. 245; 78 S. W. 569 affirming *Cantwell* v. *Mo.* 199 U. S. 602, 50 L. Ed. 329; *N. Y. ex rel.* v. *Hesterberg*, 211 U. S. 31; 53 L. Ed. 75; *Parrott* v. *Benson*, 114 Wash. 116, 194 Pac. 986; *State* v. *Pitney*, 79 Wash. 608 at 612; 140 Pac. 918; *Securities Savings Bank* v. *California*, 263 U. S. 282; 68 L. Ed. 301.

In U. S. F. & G. Co. v. *United States*, 191 U. S. 246, 48 L. Ed. 246, it is said:

> "We find no difficulty whatever in answering this question in the negative. The rule of *strictissimi juris* is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not

within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor. Such a contract should be interpreted liberally in favor of the subcontractor, with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud or unfair dealing on the part of a subcontractor, as was the case in *United States use of Heise* v. *American Bonding & T. Co.*, 89 Fed. 921, 925, or to cases not otherwise within the scope of the undertaking.

"Bonds containing the covenant in question are not common, though they have sometimes appeared in the state courts, and the construction here given them has been generally adopted (*United States use of Snyder* v. *Hazard*, 53 App. Div. 410, 65 N. Y. Supp. 1051), although these cases have generally turned upon the question whether the rights of the materialmen were affected by a change made in the contract by the principals. *Dewey* v. *State*, 91 Ind. 173; *Conn* v. *State*, 125 Ind. 514, 25 N. E. 443; *Steffes* v. *Lemke*, 40 Minn. 27, 41 N. W. 302; *Doll* v. *Crume*, 41 Neb. 655, 59 N. W. 806; *Kaufmann* v. *Cooper*, 46 Neb. 644, 65 N. W. 796; *Griffith* v. *Rundle*, 23 Wash. 453, 55 L. R. A. 381, 63 Pac. 199."

Compare *Pingrey on Suretyship & Guaranty*, Sec. 112, p. 139; *Doll* v. *Crume*, 59 N. W. 806, 41 Neb. 655; *Federal Union Surety Co.* v. *Commonwealth*, 129 S. W. 335, 139 Ky. 92; *Forburger Stone Co.* v. *Lion Bonding & Surety Co.*, 170 N. W. 897, 103 Neb. 202; *Standard*

Salt & Cement Co. v. *National Surety Co.*, 158 N. W. 802, 134 Minn. 121.

Further, the Courts have been at pains to hold that, with a corporate surety, being thus paid, there must be proof of damage before discharge. Herein hereof there is none. *Atlantic Trust & Dep. Co.* v. *Laurinburg*, 163 Fed. 690, 695; *City of Topeka* v. *Federal Union Surety Co.*, 213 Fed. 958, 963; *Maryland Casualty Co.* v. *Fowler*, 31 F. (2d) 881, 884; *Atlas Assurance Co.* v. *Lawrence*, 34 Fed. (2d) 401, 404; *West* v. *Detroit Fid. & Surety Co.*, 225 N. W. 675, 118 Neb. 554; *Philadelphia* v. *Fid. & Dep. Co.*, 80 Atl. 62, 63, 231 Pa. 208; *U. S. F. & G. Co.* v. *United States*, 178 Fed. 692; *City of Montpelier* v. *National Surety Co.*, 97 Vt. 111, 122 Atl. 488; *People* v. *Traves*, 154 N. W. 130, 188 Mich. 415; *American Surety Co.* v. *Smith*, 130 So. (Fla.) 442; *Johnson* v. *Casualty Co.*, 133 So. (Fla.) 850.

Note that this foreign Company was at pains, directly in the teeth of our statutes, to stipulate that "no action, suit or proceedings shall be had or maintained against a surety under this bond unless it shall be brought or instituted and process served upon the surety within six months after the contract and in no event after six months subsequent to the date, time or period fixed in the contract for the completion of the work specified, therein" (Tr. 20, Par. 9).

Section 2294, Code 1930; *Lasky* v. *Southern Express Co.*, 92 Miss. 268, 45 So. 869; *Standard, etc.*, v. *Broom*, 111 Miss. 409, 71 So. 653; *Sovereign Camp, etc.*, v. *Miller*, 125 Miss. 502, 87 So. 892; *Stuyvesant* v. *Smith*, 135 Miss. 585, 99 So. 575.

Counsel's declaration that "the parties were studiously attempting to draw a special contract which would not impose upon the surety the liability imposed under Section 3 of the Statute" is not accurate, for this bond, as is, with this contract, as is, comes from Louisiana where the obligation to pay is as above indicated.

If, for the purposes of this argument, we should admit that the bond here is such a bond as was contemplated by the statute, the fallacy in the argument for appellant is that it fails to note that, *quoad* the landowner, the obligation to pay the materialmen could not be by the landowner defeated, nor could it be defeated by the contractor; there were two independent obligations, the one to the materialmen that "such bond shall also be subject to the additional obligation that the contractor * * * shall promptly make payments to all persons furnishing labor or material under said contract; the other, in the event such bond does not contain any such provision for the payment of the claims of persons furnishing labor or material under such contract, such bond shall nevertheless inure to the benefit of such persons furnishing labor or materials under said contract, the same as if such stipulation had been incorporated in said bond," namely, the stipulation to make payment, which stipulation as an independent covenant has here been established to exist under the law of the State of Mississippi.

This statute, as written, was construed in this case and all herein held was that this particular bond, with the particular and express provision there inserted did constitute such a bond as was contemplated whereon

the materialmen might recover. The court has not as yet denied the right to the landowner to take a bond, but this particular landowner did take this bond, and in taking, thought, as his bill averred, that he had that specifically which the Supreme Court held he had received. The only attempt at denial is as to a surety, who signed the bond, giving the right *assumed by the landowner to be given.*

Counsel is beside the mark in claiming that the landowner here did not understand that under this bond the obligation to pay existed.

Complainant further averred and charged that the parties herein named as furnishing material in connection with said project No. 640 to said contractors "have not been paid and are entitled to recover the amount owing to them by said contractor and *to have judgment for said amount on said bond,*" but in the alternative, if the bond be not such a performance bond, then to have the assignments to the New Orleans Bank vacated. The appellant is in serious error when it seeks to assert that the landowner here did not intend to contract and did not believe that it had contracted for a performance bond for the payment of the materialmen. The original bill here filed so shows.

The amount of the bond in this case is $316,822.00, the precise amount of the contract, and counsel is in error in asserting that more than the amount of this bond might be recovered. Compare Section 758, Code 1930; *Parsons, etc.*, v. *Furr*, 110 Miss. 795, 70 So. 895; *National Surety Co.* v. *Lee*, 125 Miss. 517, 88 So. 7.

Counsel's contention that there was an express condition that it should not inure to the benefit of materialmen, the statute was unconstitutional for its abridgment of the liberty of contract (Brief 19), is answered by the observation of *Leslie Lumber & Supply Co.* v. *Lawrence* (Ark. 1928), 11 S. W. (2d), 458:

> "This provision is plainly in conflict with the condition in the bond just discussed and with the law applicable thereto as stated. By the first condition the bond company has provided protection for a class of persons who, under the law, may sue; yet by the last provision it is provided they may not sue. Both cannot stand. Surety contracts of this character, with a paid surety, are regarded as in the nature of insurance contracts, and will be most strongly construed against the surety. *Union Indemnity Co.* v. *Forgey & Hanson,* 174 Ark. 1110, 1115, 298 S. W. 1032, and cases cited. Applying this rule to the contract in question, the third clause in the bond must give way to the first and be given no force or effect."

It is further answered by a correct interpretation of the bond. The facts presented to the Supreme Court of Mississippi are not presented to this Court insofar as these appellees are concerned; the record, as now presented, nowhere shows that the owner paid the contractor in notes instead of in cash, and that question cannot be here argued, especially, as no damage was shown to have therefrom resulted.

Counsel is in error in stating the extent to which the Supreme Court of Mississippi has limited the rights of the respective parties to this litigation. It has gone

no further than to determine this particular case under this particular bond, and thereby there has been no ruthless disregard of private rights.

Counsel's dissertation as to who can give these bonds, and the number of contractors, with deference, has no foundation in fact, for that wherein Mississippi was interested was, when the material of its citizens was placed upon land, and thereby the value of such land was enhanced, that the surety for the performance of the contractor should be responsible to the materialmen. Being obligated to perform the contract, should the principal therein fail, each contribution of material made was an advance to the surety whereby that for value by the surety guaranteed, was in part done, and that now herein sought is the ungracious contention that, when the materialmen have by their contributions aided the performance of that guaranteed by the surety and wherefor the surety was unconditionally bound, there will be to them no compensation for that from them thus taken by the surety.

As demonstrated by Mr. Justice Lurton in the *Great Southern Hotel Company case, supra,* approved by this Court in 193 U. S. 532, 48 L. ed. 778, responsibility is unquestioned and imposed upon this surety who thus used for its exoneration, the material contributed by these appellees. Had they not contributed this material—this labor, then to perform appellant would of necessity have been compelled to go elsewhere thus to obtain that so thus requisite, and when under the agreement appellees had so thus to it furnished value, it was competent for the Mississippi Legislature under the precise ruling approved by this Court to im-

pose therefor an obligation on that surety which had undertaken to do that which was thus aided, abetted—rendered possible, by the material belonging to appellees.

The statutory requirement existed when the appellant executed this bond and the law of Mississippi, as thus existent, was thereby thereinto written and not only written, but agreed to, and having been agreed to, no complaint may be thereof made. *Farmers & Merchants Bank* v. *Federal Reserve Bank,* 262 U. S. 660, 67 L. ed. 1182; *Pennsylvania, etc., Co.* v. *Gold Issue, etc., Co.,* 243 U. S. 93, 61 L. ed. 610.

Counsel states truly: "The surety had the right to come in and complete the work." (Brief page 20.) This was its obligation. When in order to fulfill that obligation the appellees contributed their material, they thereby, *quoad* the surety furnished value for the obligation now exacted, and if it be that at a subsequent time, without fault upon the part of these materialmen, there was a failure by the contractor to do that which he should *quoad* the surety, therefore these appellees are not in any way therefor responsible. *Asheville Supply & Foundry Co.* v. *Catawba Const. Co.* (N. C. 1930), 151 S. E. 93; *Graphic Arts Bldg. Co.* v. *Union Indemnity Co.,* 163 La. 1, 111 So. 470. When one of two innocent persons must suffer, the law may direct which will bear the burden, and this election so thus made in this cause by the Statute of Mississippi is reasonable. These appellees are not interested in anything other or further than that under and with the consent of owner, contractor, and appellant, they furnished material to the extent wherefor a decree

was rendered. That material was integrated into a building which the surety was bound to see completed and to save harmless the landowner. Therefore, to the surety that thus done by appellees inured, and the point here at issue is may Mississippi exact of the appellant, thus receiving, value for that thus received.

As said in *Lockland Lumber Co.* v. *Robinson,* 157 N. E. (Ohio) 376, mechanics lien statutes do not create rights but merely afford additional remedies for rights in equity theretofore existing. "Natural equities in favor of materialman as creditor of the contractor give reason and constitutional validity to such a provision."

This Court cannot consider the constitutional right of the landowner; he does not complain, but avers the obligation of the surety to do that by the Supreme Court of Mississippi to him adjudged to have been done. The surety has our goods towards the fulfillment of his contract, rendered immovable and impossible of being again restored, and it is just, having agreed as he here did to pay, that the statute make him do that which he has covenanted.

The liberty of contract is not here sought to be taken away. We subscribe to every decision cited by appellant from this Court; but that which appellant overlooks is that, while there is a liberty of contract, when a statute, as here, deals with the doing of justice, and only vouchsafes, as against one bound to construct a building, a decree for that contributed without fault by the appellees, that thereasto the surety so thus giving bond has no cause to complain.

As pointed out in *Williams* v. *Riley*, 280 U. S. 78, 80, 74 L. ed. 175, 178:

> "The Federal courts have no power *per se* to review and annul acts of state legislatures upon the ground that they conflict with the Federal or state Constitution. 'That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.' "

Ohio Oil Co. v. *Conway*, 281 U. S. 46, 74 L. ed. 775; *White* v. *Johnson*, 282 U. S. 367, 75 L. ed. 388; *American Bond & Mortgage Co.* v. *United States*, 282 U. S. 374, 75 L. ed. 395; and as pointed out, constitutional objections to a statute, which may exist, if given a wider application than it is necessary to give in the decision of this particular case, is not open to consideration herein. *Young Co.* v. *McNeal-Edwards Co.*, 283 U. S. 398, 75 L. ed. 1140. As pointed out in *State Board of Tax Comrs.* v. *Jackson*, 283 U. S. 527, 75 L. ed. 1248, the fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it. Here, with the receipt by the appellant of appellee's property, donated to perform its contract, appellant may not, having that property now in its possession, refuse to pay the reasonable value thereof. The fact that the statute may work a peculiar personal hardship does not render it unconsti-

tutional. *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 75 L. ed. 482. That the State, in the matter of protecting materialmen, has a broad discretion in the exercise of its power of regulation must be admitted. *Smith* v. *Cahoon,* 283 U. S. 553, 75 L. ed. 1264.

In *O'Gorman* v. *Hartford Fire Ins. Co.,* 282 U. S. 257, 75 L. ed. 327, the Court declared:

> "The business of insurance is so far affected with a public interest that the state may regulate the rates (*German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915C, 1189, 34 S. Ct. 612), and likewise the relations of those engaged in the business (*La Tourette* v. *McMaster,* 248 U. S. 465, 63 L. ed. 362, 39 S. Ct. 160; *Stipcich* v. *Metropolitan L. Ins. Co.,* 277 U. S. 311, 320, 72 L. ed. 895, 899, 48 S. Ct. 512). Compare *McCarter* v. *Firemen's Ins. Co.,* 74 N. J. Eq. 372, 382, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 73 Atl. 80, 414, 18 Ann. Cas. 1048. * * *
>
> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist

> in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist. The record is barren of any allegation of facts tending to show unreasonableness."

The principle here involved, namely, the obligation of the surety to pay when the property of the appellees was devoted to that wherefor the surety was bound, was recognized and held constitutional in *Staten Island Rapid, etc.*, v. *Phœnix I. Co.*, 74 L. ed. 126, 281 U. S. 98. The business of appellant being affected with a public use, even under the 5th Amendment, the regulation of charges did not deprive it of liberty or property without due process. *Tagg Bros.* v. *United States*, 280 U. S. 420, 74 L. ed. 524.

The landowner may well object to living in a house which was built with materials that were not paid for. This was recognized by this Court in the *Great Southern Case*, and furnishes an additional reason why this act is constitutional.

Appellant, having in possession the materials of appellees in virtue of installation in that wherefor appellant was normally bound, is estopped, by this constructive receipt, which in the normal travel advantaged it, to deny therefor responsibility when the appellees are without fault. Compare *Hightower* v. *Bailey*, 108 Ky. 198, 56 S. W. 147, 22 Ky. Law Rep. 88, 49 L. R. A. 255, 94 Am. St. Rep. 350.

Under Section 2, Chapter 128, Laws 1918, if the principal contractor desires to "assign, transfer, or otherwise dispose * * * of the contract or pro-

ceeds thereof, to the detriment or prejudice of the subcontractor, materialmen or laborer," then he may not do so, unless the bond provided is given.

If the master workman or contractor does not assign, transfer or otherwise dispose of either the contract or its proceeds to the detriment or prejudice of the subcontractor, materialman or laborer, he may contract as often as he pleases, without bond; that is to say, if he forthwith applies the total proceeds of the contract to the liquidation of his individual liability to subcontractor, laborers, materialmen, the statute does not affect him in any way.

It is when he desires to exercise a right, viz., to assign, transfer, or otherwise dispose of these amounts to the prejudice or detriment of those justly entitled thereunto, that the statute says, in order to obtain this right, he must execute a bond to protect those justly entitled.

The United States has adopted precisely this same protection. *United States* v. *American Surety Co.*, 200 U. S. 200, 50 L. ed. 441. The Supreme Court of Mississippi gives the same effect to our statute. *Alabama Marble Co.* v. *U. S. F. & G. Co.*, 111 So. 573, 146 Miss. 414.

In *Mankin* v. *United States*, 215 U. S. 536, 54 L. ed. 317, it was held, specifically, to be constitutional to impose this liability in favor of subcontractors, even though the full amount due had been paid.

In *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 380, 61 L. ed. 1211, the Court said:

> "As the basis of recovery is supplying labor and material for work, he who has supplied

> these to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *United States*, 215 U. S. 533, 54 L. ed. 315, 30 Sup. Ct. Rep. 174."

Counsel seeks to distinguish these cases on the ground that the United States, or the state, has plenary power to prescribe conditions of contract when the sovereign is contracting; but, insofar as the contractee is concerned, furnishing materials for the building where the land is owned by other than the contractor, the right, *quoad* contractee, is precisely similar to that here involved and here sustained. *Dickson* v. *U. S. F. & G. Co.*, 117 So. 248, 150 Miss. 864, *supra*.

Compare *Ætna Casualty & Surety Co.* v. *U. S. Gypsum Co.*, 39 S. W. (Ky.) (2d) (1931) 234 (a companion case which was followed in *Ramsey* v. *Vincennes Bridge Co.*, 283 U. S. 796, 75 L. ed. 1420), where it was said:

> "It is argued that the distinction in the decisions depends upon the character of the subject-matter of the contract, and, when the contract concerns a public improvement, as here, it will be presumed that the bond was intended for the benefit of laborers and materialmen. It is said that they are unable to assert a lien on public property, and for that reason the bond is provided to supply the rights ordinarily given by lien laws. In amplification of the argument, it is insisted that, when the subject-matter of a contract is a private structure, the lien laws of the state afford ample remedy, and it is unnecessary to resort to a bond for their protection. But such distinction is artificial and

drawn from the accidental circumstances of the cases." * * *

"The same motive that prompted the passage of material and labor lien laws is sufficient to suggest the expediency of a surety contract for the benefit of those who perform labor or furnish material. A private owner may well desire to be free from the vexation of claims or suits, and to that end may require a bond to protect him against vexation as well as liability. It is conceivable that a private owner might wish not to have upon his property a structure composed of materials or erected by labor not paid for by the contractor. So, if the contract is sufficient in its terms to manifest an intention that the contractor shall pay for the labor and material, it is a valid obligation and enforceable in favor of any person for whose benefit it may have been executed."

The rule is that if it were constitutional to insert the name of these appellees as payees, then it would be constitutional to insert the provisions under which the obligation was to them payable, when, voluntarily, this corporation made the obligation for a valuable consideration. *Philip Carey Co.* v. *Maryland Casualty Co.*, 206 N. W. 808 (Iowa, 1926), where the court said:

"(3) Where a statutory bond is given, the provisions of the statute will be read into the bond. *Asberg* v. *Ass'n*, 143 Minn. 354, 173 N. W. 708; *People* v. *Surety Co.*, 211 N. Y. 107, 105 N. E. 99; *School District* v. *Construction Co.*, 87 Or. 132, 169 P. 507, 788; *Nye-Schneider-Fowler Co.* v. *Roeser*, 103 Neb. 614, 173 N. W. 605; *United States ex rel. Hoffman* v. *Quincy*,

4 Wall (71 U. S. 535, 18 L. ed. 403); *Northern Pacific R. Co.* v. *Wall*, 241 U. S. 87, 36 S. Ct. 493, 60 L. ed. 905; *Gill.* v. *Paysee* (Nev.) 266 P. 302; *Forgarty* v. *Davis, supra; Faurote* v. *State*, 110 Ind. 463, 11 N. E. 472; *Lowe* v. *City*, 4 Okla. 287, 44 P. 198; *Iddings Co.* v. *Construction Co.*, 104 Neb. 124, 175 N. W. 643, again, and aside from this well recognized rule, it is the plain requirements of the statute itself that the provisions and requirements of the act shall not be modified and annulled by statutory provisions in the bond."

Compare *Peoples* v. *Metropolitan Surety Co.*, 105 N. E. 99 (1914, N. Y.); *American Surety Co.* v. *Small Quarries*, 120 S. E. 617 (1923 Ga.).

Consider Section 2888 of Code Mississippi 1930, providing:

"Conditions of Official Bonds.—The bonds of all officers required to give bond shall be conditioned in the following form, to-wit:

" 'Whereas, the above bound A B was duly elected (or appointed) to the office of ——, on the — day of —— for the term of — years, from the — day of ——; therefore, if he shall faithfully perform all the duties of said office during his continuance therein, then the above obligation would be void.'

"But the failure to observe the form herein prescribed shall not vitiate any official bond; and all official bonds shall be valid and binding in whatever form they may be taken, except so far as they may be conditioned for the performance of acts in violation of the laws or policy of the state; and whether in the proper penalty or without any penalty, or whether correct or incorrect in its recital as to the term of

office or otherwise, or whether properly payable or whether approved by the proper officer or not approved by any, or if irregular in any other respect, such bond, if delivered as the official bond of the officer to the full penalty, or if it has no penalty, to the full penalty of the bond which might have been required."

This provision has been in effect since the Code of 1871, and has been enforced by divers decisions of the Court, *Cox* v. *Ross*, 56 Miss. 481; *State* v. *Smith*, 87 Miss. 551, 40 So. 23; *Adams* v. *Williams*, 97 Miss. 113, 52 So. 865.

When, as here, the law prescribes what the penalty shall be, what the conditions shall be, it has been the holding of our State that a blank piece of paper properly signed was a valid bond. Furthermore, by Section 5185, Code of 1930, the legislature specifically provides the form of the "mortgage clause." Under *Bacot* v. *Phenix Ins. Co.*, 96 Miss. 223, 60 So. 729, this section automatically writes itself into every insurance contract. *Etna Ins. Co.* v. *Cowan*, 111 Miss. 473, 71 So. 746.

In the case at bar, the surety company has specifically contracted as a surety company doing business in the State of Mississippi, and is there engaged in this business, as a part and parcel of the modern protection, demanded under the name of insurance, the power of the State has become paramount to regulate and to integrate into this bond as into a policy, all of those things requisite and necessary to protect the citizen. This is a part of the insurance business, and this bond is given pursuant to permission granted to this company when it came into Mississippi, and it

agreed specifically and definitely that it would be subject to the Department of Insurance. Section 5129, Code of 1930.

Similar statutes exist elsewhere. Compare *American Indemnity Co.* v. *Burrows Hardware Co.* (Tex. Civ. App.), 191 S. W. 574; *Rio Grande Lumber Co.* v. *Darke,* 167 Pac. 241, 1918 L. R. A. 1193.

A statute requiring the owner to take a bond, and making him liable in case one was not taken, has been in effect in Louisiana for a long time, and, as pointed out in *McDonald* v. *H. Gas & Oil Co.,* 2 La. App. 241, where the owner, in a contract, does not require a hundred *per cent* bond, Act No. 139 of 1922 does not apply. Bond Act No. 229 of 1916 does. See, also, *Baton Rouge Sash & Door Co.* v. *Deceur,* 2 L. App. 129; *Joubart* v. *U. S. F. & G. Co.,* 3 La. App. 525.

As pointed out in Tennessee, *Cole Manf. Co.* v. *Falls* (1891), 80 Tenn., 16 S. W. 1045, where a statute required the owner to pay a claim, in excess of the amount due on the contract price, in favor of materialmen, the court declared:

> "Double payment does not follow as a necessary legal consequent in any case. In every instance, the owner may fully protect himself by withholding the whole or a sufficiency, of the price agreed upon, from the original contract, until after the expiration of thirty days, or he may see to it, that the subcontractor and materialmen are paid as the work progresses, or he may indemnify himself by bond as prescribed in the 3rd section of this act."

In Kansas, Code of 1925, Section 1401, a lien is given and in Section 1412 it is provided that the con-

tractor or owner mentioned in this may execute a bond to the State of Kansas conditioned for payment of all claims which might be a basis for lien * * * and when same has been filed, no lien, as herein provided for, shall attach. This statute has been in effect for many years, and has been treated as valid.

Under the Iowa Code, Section 3093, substantially, similar provisions have been made.

In California, *Roystone Co.* v. *Darling,* 171 Cal. 526, 154 Pac. 15 (1915), approved in *Roberts* v. *Spires,* 232 Pac. 708, 195 Cal. 267, construed Section 1163 (1911) which described two classes of liens. One class consists of liens in cases where the bond has not been filed, in which case the state of accounts between the owner and contractor, and even the contract price, are immaterial to the lien, except as to the contractor. The other class consists of all cases in which the proper bond and contract are duly filed.

This *Roystone case* is reaffirmed in the case of *Hollenbeck* v. *Amweg,* 170 Pac. 148 (1917, 177 Cal. 159), in upholding the constitutionality of the above statute, wherein the Court said:

> "It is further urged that the provisions exempting the owner from liability beyond the contract price if he file a bond and making him liable for liens to the extent of the value of labor and materials if he does not provide such bonds is in violation of the constitutional inhibitions of the imposition of penalties by legislative enactment. The Constitution (Sec. 15, Act 22) guarantees a lien to mechanics and materialmen extending to the full value of all labor and materials furnished. But the Legislature may,

> under authority given by constitution, provide certain conditions upon companies with which the owner may restrict recovery to the sum mentioned in the contract. Such provision does not impair any existing right of the owner—does not, in short, penalize him—but the effect is to confer a right not previously existing by which the liability may, under certain circumstances, be curtailed. *Stenson Mill Co.* v. *Nolan,* 5 Cal. App. 754, 91 Pac. 262."

There is, also, a similar provision in the Texas constitution. 40 *C. J.*, 42.

The rule in California goes much further than it is essential to go in Mississippi. In the instant case, the bonds specifically provide for a liability, and even in the State of Texas they would be perfectly valid. See *Fife* v. *Indemnity Ins. Co.,* 283 S. W. 645.

In *Stewart* v. *Brewster,* 284 S. W. 53 (1926 Ark.), where it was contended a materialman could not recover on bond given by contractors to owner, because said materialman had not filed his claim for a lien as Sec. 6922 of C. & M. Digest required, the court held in overruling objection and construing the statute:

> "It will be observed that it is not obligatory upon the owner of the improvement to require the principal contractor to execute a bond. He may do so or not, as he deems to his interest. Likewise, the contractor is not required, by virtue of the law, to execute a bond. He may refuse to do so. It is entirely a matter between the contractor and the owner as to whether the bond provided by statute shall be executed. But, where such bond is required by the owner and executed by the principal contractor, then

the persons for whose use and benefit the bond is executed (Sec 6906, *supra*) must look to the bond as their security for the payment of their claims and not to a lien on the improvement. In other words, where the bond provided for under 6912, of C. & M. Digest, is not executed those who are given a lien under Sec. 6906, *supra*, must comply with the provisions of Sec. 6922, *supra*, in order to avail themselves of the benefit of such lien; but if the bond is executed as provided by Sec. 6912, *supra*, then the parties having claims, which might be the basis of liens, do not have to comply with the provisions of Sec. 6922, *supra*, in order that they may establish and obtain the payment of their claims. They must resort to the bond. The language of Sec. 1, of Art. No. 446, of Acts of 1911, Sec. 6912, *supra*, shows that where the bond is executed pursuant to that section the persons otherwise entitled to liens are no longer entitled thereto, and hence would not have to comply with the provisions of Sec. 6922, *supra*, where the bond is executed, *ipso facto*, the provisions relating to liens on improvements are superseded and no lien can attach."

See *Accident & Indemnity Co.* v. *Knox Co.*, 132 Atl. 261 (Ky. 1926), where it is said:

"This Court has also decided on numerous occasions that those furnishing labor and material could recover on a contractor's bond where there was a statute or ordinance requiring that they should be protected by the bond. *So. Md. Bank* v. *Nat. Surety Co., supra; American Fidelity Co.* v. *State*, 109 A. 99, 135 Md. 326; *Baltimore* v. *Casualty Co.*, 126 A. 880, 146 Md. 508, 513; *American Fidelity Co.* v. *State*, 97 A.

12, 126 Md. 50. In the case last cited the Court quoted with approval the statement found in an exhaustive note to *Knight & Jellison Co.* v. *Castle*, 27 L. R. A. (N. S.) 573.

Again, *Independence Trust Co.* v. *Porter*, 132 S. E. 806 (N. C. 1926), says:

> "On these, the facts chiefly relevant, we think the demurrer as it relates to the second cause of action was properly overruled. Undoubtedly, the laborers, had they not assigned their claims would have been entitled to maintain an action on said bond, and we think it must be held, in keeping with the general trend of authorities on the subject, that the claims of laborers and materialmen may be assigned without losing the protection of the bond given and intended for their benefit. *Title Guaranty & T. Co.* v. *Crane*, 31 S. Ct. 140, 319 U. S. 24, 55 L. ed. 72; *Bank* v. *Casualty Co.*, 161 P. 475, 93 Wash. 635, Ann. Cas. 1918 D, 645.
>
> "Here the bond in suit was intended to perform a double purpose: (1) To insure the faithful performance of all obligations assumed by the contractor toward the state highway commission, (2) to protect third persons furnishing materials or performing labor in and about the construction of said roadway. *Plyler* v. *Elliott*, 131 S. E. 306, 191 N. C. 49; *Town of Cornelius* v. *Lampton*, 128 S. E. 334, 189 N. C. 714. In its second aspect, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor or materials they furnish or supply to enable the principals in the bond to carry out its contract with the state highway commission. *United*

States v. *Natl. Surety Co.*, 92 F. 549, 34 C. C., 526."

Again, in *Yawkey-Crowley Lumber Co.* v. *Sinaiko*, 206 N. W. 976 (Wis. 1926):

> "That the claims of those whom the owner paid for labor and material did not ripen into formal mechanics' liens so as to comply with the phrase in the contract concerning the bond and relating to such mechanics' liens is not at all material or controlling or in any way limiting the liability of the surety. Upon the payment by the owner of the obligations of the contractor for labor and material left unpaid by him, such contractor, the owner clearly became subrogated to the rights of those whose labor and material were thus paid for as against the contractor and his surety on this bond. That such a bond does create an obligation in favor of third persons furnishing labor and material to such contractor has been too often held to now need discussion. *United States Gypsum Co.* v. *Gleason*, 135 Wis. 539, 543, 116 N. W. 238, 17 L. R. A. (N. S.) 906; *R. Connor Co.* v. *Ætna Indemnity Co.*, 138 Wis. 13, 18, 115 N. W. 811 (in which is distinguished the case relied upon in the court below of *Elec. A. Co.* v. *United States F. & G. Co.*, 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 800; *Warren Webster & Co.* v. *Beaumont Hotel Co.*, 151 Wis. 1, 10, 138 N. W. 102; *Concrete Steel Co.* v. *Ill. Surety Co.*, 163 Wis. 41, 47, 157 N. W. 543; *Builders' L. & S. Co.* v. *Chicago B. & S. Co.*, 167 Wis. 167, 170, 160 N. W. 320; *Building Cont. L. M. L. Ins. Co.* v. *Southern S. Co.*, 185 Wis. 83, 200 N. W. 770.

"Under the plain language of the bond, that the obligation of the surety is that the contractor will pay all the amounts due for labor and materials, required of him under the contract, as well as the condition that there shall be full and complete performance of the contract, which by its terms in effect, requires the same thing, we can see no escape from liability of the surety for any amounts, not in excess of the sum of $8,000, which were properly paid by the owner in excess of the contract price in the completion of the work. That here was a grafuitous, as distinguished from a paid, surety, cannot permit the ignoring of unambiguous language such as is here presented in the bond itself. There is here no opportunity to indulge in strict or liberal construction; it permits but of plain construction."

See *Rio Grande Lumber Co.* v. *Darke*, 50 Utah 114, *supra.*

Then, so far as this provision of the bond is concerned, substantially similar bonds in public contracts have been made effective by the Supreme Court of Mississippi in *U. S. F. & G. Co.* v. *Yazoo County*, 110 So. 780, 145 Miss. 378.

The case here is supported by the rule of *Surety Co.* v. *Hall Miller Co.*, 104 Miss. 626, 61 So. 700, where the Court said:

"Taking it as a cold-blooded business proposition, this clause in the bond would naturally encourage subcontractors of the best sort to take contracts to do certain parts of the work; it would tend to prevent the abandonment of the

> work by mechanics not promptly paid their wages by the contractors, who might be suspected to be of doubtful financial solvency; it would procure the best work and material, and the prompt services of all workers and sub-contractors; and all of this would redound to the benefit of the public. It must be borne in mind that the mechanics, materialmen and laborers could have no lien upon the building, and that the trustees, representing the state, would not be bound to reserve money with which to pay their claims; but they would have to depend upon the contractor alone. Taking these things into consideration, the bond, in a way supplied the place of the mechanics' lien law, and thus gave an additional security to all persons working upon this building and supplying material therefor; and this alone was, in our opinion, of the highest importance to the State."

This principle would be applicable to public and private contracts.

Again, we cannot but reiterate that the agreement in this case was properly determined by the State Supreme Court as a State question, and to that end we rely, with confidence, upon the interpretation of the Kansas Court in *Algonite Stone Mfg. Co.* v. *F. & Dep. Co. of Maryland* (Kan. 1917), 163 Pac. 1076, 100 Kan. 28, where that court construed a bond far less express than this one to vouchsafe payment to materialmen. Compare also *Johnson Electric Co.* v. *Columbia Casualty Co.*, 133 So. 851; *Concrete Steel Co.* v. *Illinois Surety Co.* (Wis. 1916), 157 N. W. 543.

Point IV.

Should the Court determine Section 3 aforesaid to be unconstitutional, yet notwithstanding, the bond executed may be sustained as a valid common law obligation and the judgment of the Supreme Court of Mississippi cannot be reversed, as an adequate obligation existed under this common law obligation for judgment rendered.

> "It is only when a decision on the validity of a statute is necessary to the determination of the cause that the same will be made" (*State* v. *Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Allen* v. *State of Ga.*, 166 U. S. 138, 41 L. Ed. 951; *Sully* v. *American Natl. Bank*, 178 U. S. 289; 44 L. Ed. 1072).

The Mississippi Supreme Court held on the appeal to settle the principles of the instant case, that—

> "It was the intention of all of the parties to give the bond therein provided for and that the bond is to be construed in connection with the contract; it was designed to protect the Owner and the Contractor and that it was so dealt with by all the parties.
>
> "It will be seen from a recital of the bond itself that it referred to the contract and to the plans and specifications made a part of the contract and the bond.
>
> "This being true, it is plain, we think, that it was the intention and purpose of the parties to execute a bond in conformity with Section 3 of the Act above quoted" (Tr. 56).

The contract documents made specific reference to the statute of Mississippi, and, regardless of whether or not that statute should be held unconstitutional as

an enforcible act, yet the parties themselves voluntarily adopted its terms into their voluntary contract and are, therefore, now bound by its terms as a provision of their contract, even if they are not bound thereunder as by a statute. *Southerly Surety Company* v. *Nalle & Co.*, in 242 S. W. (Texas) 197.

The *Nalle case* was brought on a building bond conditioned for faithful performance of the contract. The Court in discussing the case stated an established rule of law, which, we submit, is applicable to the present case now here on appeal, even in event the Mississippi statute could be held unconstitutional. The Court in the *Nalle case* said:

> "There is nothing in the record showing or tending to show that the owners in taking this bond were constrained to do so solely by virtue of said statute or that any of its terms or conditions were demanded by the owners solely by reason thereof. *There is nothing in the record showing or tending to show that the bond or any of its terms or provisions were anything other than mutual voluntary agreements and engagements of the parties.*
>
> The record in this case merely shows the bond sued on. When such bond is compared with certain articles of the statute we find that the penalty therefor is in the minimum amount and that it is payable and conditioned substantially as prescribed by them.
>
> *"Where a bond is wrongfully demanded under color of official authority or as a condition to some act, privilege or benefit to which the maker is entitled without giving any bond such bond, if given, will be held to be void for duress"* (*Dupree* v. *State*, 102 Texas 455, 471; 119 S. W.

301; *Leona Irr. Man. & Canal Co.* v. *Roberts*, 52 Texas 615, 622).

"*The general rule is that a bond, whether required by statute or not is good at common law if entered into voluntarily* and for valid consideration, and if not repugnant to the letter or policy of the law.

"A bond executed in pursuance of a statute is not necessarily void because the statute is afterwards declared unconstitutional. If entered into for a lawful purpose without duress and for a valid consideration independent of the statute, such bond may be enforced as a common law obligation" (9 *C. J.* pages 28 and 29, paragraphs 43 and 45; 4 *R. C. L.* page 55, paragraph 15; and other cases there cited).

The *Nelle case, supra,* is directly in support of the above case, and the same is supported by other Texas cases, amongst which is that of *Equitable Surety Company* v. *Stemmons*, reported in 239 S. W. 1037.

In the *Hartford Accident & Indemnity Company case* here on appeal it was established that the specifications, plans and agreement became a part of the bond and were incorporated therein and that the bond became a part of the contract of the Natchez Investment Company with Burkes, the contractor, and the bond company, and that the surety on the bond by reference to the bond and contract documents undertook on its part the performance of all the obligations of the principal contractors, Burkes.

We submit that under the wording of the contract and specifications one conclusion only can be drawn as to the intent of the parties entering into the contract and that was that the bond was to be given whereby Burkes & Company, the builders, were to

erect the Eola Hotel and were to pay for all materials and labor entering into the same, that it was the intent to incorporate into the contract and bond the wording and provisions of the statute, being Chapter 128, Laws of 1918; and we, therefore, submit further that the bond, even though Section (3) of the Statute, Chapter 128, Laws of 1918, should appear to the Court as being unconstitutional, yet the bond would still stand as a common law bond and would be enforceable although the statute might be declared unconstitutional.

The reasons for these conclusions are:

(1) That the bond in question was voluntarily entered into by all the parties without compulsion by statute, as the statute did not require the giving of any bond, but simply wrote the terms and conditions into the bond in event same should be given.

(2) There was a valid consideration paid for the bond premium.

(3) That the consideration was received by the appellant here and the benefits thereof retained by the appellant and that no tender has been made back.

(4) That the benefits accruing from the giving of the bond have been used and enjoyed by the principal, Burkes, and by their sureties, Hartford Accident & Indemnity Co., appellant here, in that by giving of the bond the principal was enabled to make use of the proceeds of the contract price and the surety has been enabled to have his principal complete the building in accordance with the plans and specifications and the liability of the surety thereby reduced *pro tanto* from

the original figure of $316,822 to a figure of approximately $60,000, the aggregate of all claims filed against the surety.

The law as announced in the *Nalle case, supra,* is in line with the holdings of this Court in *Daniels* v. *Tierny,* 102 U. S. 415, 26 L. Ed. 187, which action was on a bond authorized under the Virginia Secession Ordinance, which provided that by giving a bond the debtor might prevent the enforcement of execution against him. The Court in the case cited pronounced the statute void, but held that inasmuch as the obligor had enjoyed its benefits by obtaining a stay of execution he was estopped to question its validity. The language therein used is peculiarly applicable here:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself, for his benefit, of a constitutional law, he cannot in a subsequent litigation with others not in that position aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such case the principle of estoppel applies with full force and conclusive effect" (*Daniels* v. *Tierny, supra*).

See also *Stevenson* v. *Morgan,* 67 Neb. 207; 93 N. W. 180; 108 A. S. R. 629.

See also *U. S. F. & G. Co.* v. *Ettenheimer,* 70 Neb. 144; 97 N. W. 227; 113 A. S. R. 783.

To the same effect it was held in *Douglass* v. *Unmark,* 77 Conn. 181, 107 A. S. R. 25, that an unsuccess-

ful plaintiff in replevin who has seized goods belonging to the defendant is estopped, together with his bondsmen in an action upon recognizance, from alleging, or being benefited by, the fact that it was entered into before a magistrate other than the one who signed the writ of replevin.

The bond in question here was a voluntary bond and is good at common law for the reason that there was a valid consideration therefor and that there is nothing repugnant to the letter or the policy of the law of Mississippi or of the Constitution of the United States in the giving of this bond.

See *Moses* v. *U. S.* 166 U. S. 571, 586; 17 Sup. Ct. 682; 41 L. Ed. 1119.

The decision of the Supreme Court of Mississippi in this cause here can, therefore, be upheld on the grounds that the bond in question is a common law bond, regardless of the constitutionality or unconstitutionality of the statute, and the question of the legality of the statute need not be decided in order to reach the conclusion already arrived at in this case.

In conclusion, on this proposition, we have to say that counsel for appellant state in their brief that the record in this case shows that the appellant, surety company, sought studiously to avoid giving the statutors bond under Chapter 128 of the Laws of Mississippi of 1918.

We submit, on the contrary, that the record in this case shows that such was not the intention of the owner of the building, the contractors, Burkes, or of Hartford Accident & Indemnity Company, the surety, but, the contract documents controlling the recitations in the bond, it is shown clearly that it was the intention

of the parties, the owner, the contractor, Burkes, and the surety, Hartford Accident & Indemnity Company, to give the kind of bond provided for under the laws of the State of Mississippi.

Furthermore, with deference to this Court, these are questions of fact with which this Court will not concern itself. The facts were submitted to the Chancery Court of Adams County, Mississippi and by it adjudicated adversely to Hartford Accident & Indemnity Company, and this finding of fact by the Chancery Court of Adams County, Mississippi has been upheld by the Supreme Court of the State of Mississippi.

No testimony taken on the trial of this cause is before this Court in the Record whereby the decision of the lower court can be gainsaid.

POINT V.

As to the application by the Ætna Casualty & Surety Company to become a joint appellant, a motion to dismiss on this specific ground was made by appellees and served upon appellant November 30, 1931. After this motion was so thus made, the Ætna Casualty & Surety Company seeks to become a joint appellant. It may not do so, iterating the grounds of the motion, because:

(A) The Supreme Court of the State of Mississippi, wherefrom this appeal was taken, has not granted to this Company an appeal from the decision there made.

(B) The time for taking such appeal has now long since expired, and the statute has barred the right so thus to appeal; and having been barred, if the appellant is allowed to join in the appeal, the appellees desire when and if it is so thus allowed to interpose a

ples of the Statute of Limitations in this Court in virtue of the expiration of the time; the judgment of the Supreme Court of Mississippi having been rendered against the Ætna Casualty & Surety Company on February 23, 1931 (Tr., 74), and the suggestion of error having been overruled on June 15, 1931. The suggestion of error the Ætna Casualty & Surety Company did not join, it being the suggestion of error only of the Hartford Accident & Indemnity Company, filed March 21, 1931 (Tr., 83). Therefore, insofar as the Ætna Casualty & Surety Company is concerned, this judgment became final at the date first mentioned, and with reference thereto naught has been done from that time until now, and it is now too late to appeal to this Court therefrom.

WHEREFORE we respectfully submit this cause should be affirmed.

Respectfully, L. T. KENNEDY,
W. A. GEISENBERGER,
GERARD BRANDON,
G. H. BRANDON,
C. F. ENGLE,
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GARNER W. GREEN,
Attorneys for Appellees.

By GARNER W. GREEN.

Of Counsel:

BRADLEY, BALDWIN, ALL & WHITE.

Service of the foregoing is hereby acknowledged this December 21, 1931.

ARTHUR G. POWELL,
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Counsel for Appellant.

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